UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 04-5012

STEPHEN S. ADAMS, AND 14,302 OTHER SIMILARLY-SITUATED PLAINTIFFS,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

FILED December 9, 2004.

Before MICHEL, RADER, and PROST, Circuit Judges.

MICHEL, *Judge:*

Stephen S. Adams and 14,302 other similarly-situated individuals (collectively, "Appellants") were employed between 1984 and 1995 as GS-9, GS-11, GS-12, and GS-13 criminal investigators in various federal law enforcement agencies, including the Bureau of Alcohol Tobacco and Firearms ("BATF"), the Drug Enforcement Agency ("DEA"), the Internal Revenue Service ("IRS"), the United States Customs Service ("Customs Service"), and the United States Secret Service ("USSS").[1] They appeal from the order of the United States Court of Federal Claims granting the Government's motion to dismiss their takings complaint for failure to state a claim upon which relief may be granted. *Adams v. United States*, No. 00-447C, 2003 U.S. Claims LEXIS 238 (Fed. Cl. Aug.11, 2003). Appellants

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[1] Several of those agencies or units thereof have since been renamed and/or merged into the United States Department of Homeland Security. *See* Homeland Security Act of 2002, Pub.L. No. 107-296 § 1502, 2002 U.S.C.C.A.N. (116 Stat. 2135, 2308 (2002)).

received overtime compensation, apparently pursuant to the Federal Employees Pay Act ("FEPA"), codified at 5 U.S.C. § 5542, at a rate less than one-and-one-half times their regular rate of pay.[2] Appellants assert entitlement to overtime compensation at the rate specified under the Fair Labor Standards Act ("FLSA"), codified at 29 U.S.C. §§ 201-219, which is at least one-and-one-half times their regular rate of pay, rather than at the lower rate provided for in the FEPA. In other words, Appellants seek to recover as damages the difference between what they received under the FEPA versus the amount they would have received under the FLSA ("underpaid overtime compensation"). The case was submitted for decision after oral argument on September 7, 2004. Because Appellants do not have a cognizable property interest in either the underpaid overtime compensation or in an administrative claim thereto within the meaning of the Takings Clause of the Fifth Amendment, we affirm.

I. BACKGROUND

A. Statute of Limitations Applicable to FLSA Claims

The FLSA provides overtime compensation to certain employees who work more than forty hours per week at a rate not less than one-and-one-half times the employees' regular rate of compensation. This statute originally did not cover federal employees. In 1974, however, Congress extended it to federal employees, but exempted those classified as executive, administrative, or professional. *Id.* § 213(a)(1).

To recover unpaid overtime compensation under the FLSA, a federal employee may file either an action at law or

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[2] The parties fail to analyze the specific provision under which Appellants received compensation for overtime work. Nevertheless, the Government cited the FEPA in its brief, a citation that was not contradicted in Appellants' reply brief.

a claim before the General Accounting Office ("GAO"). Actions at law brought under the FLSA are subject to the statute of limitations provided in the Portal-to-Portal Pay Act, codified at 29 U.S.C. §§ 251-262, which provides for a two-year limitations period for cases in which the FLSA violation is non-willful and a three-year period where the violation is willful. *Id.* § 255(a).

The statute of limitations for administrative claims before the GAO initially was selected, then revised by, the Comptroller General of the United States and twice altered by Congress. The numerous changes in the statute of limitations for claims before the GAO, in part, create the backdrop of the instant takings claim. Therefore, it is important to have a general understanding of the evolution of the limitations periods involved.

In 1978, the Comptroller General ruled that the statute of limitations for FLSA claims before the GAO was not the statutory period specific to FLSA claims, but was six years as set forth in the more generally applicable Barring Act, codified at 31 U.S.C. § 3702(b). *In re Transp. Sys. Ctr.*, 57 Comp.Gen. 441 (1978). Sixteen years later, on May 24, 1994, the Comptroller General effectively changed the statute of limitations for FLSA claims before the GAO from six years to two years for non-willful violations and three years for willful violations, essentially recognizing as applicable the limitations period specifically set for FLSA claims in the Portal-to-Portal Pay Act. *In re Ford*, 73 Comp.Gen. 157 (1994).

Shortly thereafter, on September 30, 1994, Congress enacted the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub.L. No. 103-329, 108 Stat. 2383, 2432 (1994). Section 640 of that act mandated that the Comptroller General apply a six-year statute of limitations period to any administrative claim under the FLSA filed prior to June 30, 1994, and a two-year

statute of limitations period to any such claim filed after June 30, 1994.

On November 19, 1995, Congress enacted the Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub.L. No. 104-52, 109 Stat. 468, 468-69 (1995), which amended Section 640 to further limit the types of FLSA claims that may be decided by the GAO ("amended Section 640"). Amended Section 640 precluded, among other changes, application of the six-year statute of limitations originally set forth in Section 640 to employees who had received overtime compensation under another provision of law. Thus, those employees were limited to the two-year statute of limitations period.

B. Appellants' Status Under the FLSA

Pursuant to 5 C.F.R. § 551.201, the BATF, the DEA, the IRS, the Customs Service, and the USSS independently determined, as the respective employing agencies, that Appellants were administrative employees exempt from the FLSA and its overtime provisions. In making this determination, the employing agencies evaluated whether Appellants' duties met the administrative exemption criteria set forth in 5 C.F.R. § 551.206. Significantly, Appellants were presumed to be non-exempt under the civil service regulations, thereby requiring the employing agencies to carry the burden of establishing that the Appellants met the criteria of § 551.206. *Id.* §§ 551.202(a), (c).

Dissatisfied with this exemption determination, Appellants filed an action at law under the Tucker Act, codified at 28 U.S.C. § 1491, against the Government in the United States Court of Federal Claims. Simultaneously, Appellants filed identical administrative claims before the GAO. In both proceedings, Appellants alleged that they were improperly ruled exempt from the FLSA and were entitled to damages flowing from this misclassification. In a

decision dated October 30, 1992, the Court of Federal Claims concluded that some of the Appellants were exempt, while others were non-exempt. *Adams v. United States*, 27 Fed.Cl. 5, 28-29 (1992).

On September 23, 1998, we partially reversed the Court of Federal Claims' ruling in a non-precedential opinion and remanded the case for further proceedings as to those criminal investigators held exempted from the FLSA. *Adams v. United States*, No. 98-5011, 1998 WL 804552, 1998 U.S.App. LEXIS 23565 (Fed.Cir. Sept. 23, 1998) (Table). That case remains pending before the Court of Federal Claims.

C. Prior Court Proceedings Leading to the Instant Appeal

On October 27, 1995, prior to the enactment of amended Section 640, Appellants filed suit against the Government in the United States District Court for the District of Columbia, seeking mandamus, injunctive, and declaratory relief against the GAO for its inactivity on their administrative claims. Following the enactment of amended Section 640, Appellants twice supplemented their complaint to challenge the constitutionality of original Section 640 and amended Section 640 under the Due Process and Takings Clauses of the Fifth Amendment.

On October 12, 1996, the district court granted summary judgment in favor of the Government. *Adams v. Bowsher*, 946 F.Supp. 37 (D.D.C.1996). The district court addressed Appellants' due process arguments, ultimately concluding that neither Section 640 nor amended Section 640 violated the Due Process Clause. As to Appellants' takings claim, the district court concluded that a compensable taking did not occur, based upon the three factors set forth for regulatory takings in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 89 L.Ed..2d 166 (1986). *Adams*, 946 F.Supp. at 44. Appellants appealed that

decision to the United States Court of Appeals for the District of Columbia Circuit.

On August 28, 1998, the District of Columbia Circuit affirmed the district court's decision on the due process claim, but reversed its decision on Appellants' takings claim. *Adams v. Hinchman*, 154 F.3d 420 (D.C.Cir.1998). The circuit court noted that takings claims for amounts greater than $ 10,000 fall within the exclusive jurisdiction of the Court of Federal Claims pursuant to the Tucker Act. *Id.* at 425-426. Consequently, the circuit court concluded that the district court might lack jurisdiction to entertain Appellants' takings claim and remanded the takings claim to the district court to determine whether jurisdiction was proper under the Little Tucker Act, codified at 28 U.S.C. § 1346(a)(2), for claims of less than $10,000, which lodges concurrent jurisdiction in the district courts.

On March 30, 2000, the district court issued an opinion answering the jurisdictional question posed by the circuit court. *Adams v. Walker*, No. 95-2015 (D.D.C. Mar.30, 2000). The district court noted that Appellants sought to amend their complaint to allege an amount in controversy in excess of $10,000. The district court stated that the circuit court "essentially rejected [Appellants'] claim for injunctive relief and viewed it instead as a claim for money damages." *Id.*, slip. op. at 5. Hence, the district court concluded that justice required it to allow Appellants to amend their complaint and, therefore, to transfer the case to the Court of Federal Claims. *Id.*, slip. op. at 6. The district court thus vacated its ruling concerning Appellants' takings claim and ordered the case transferred to the Court of Federal Claims pursuant to the transfer provision in 29 U.S.C. § 1631. *Id.*, slip. op. at 9.

D. The Court of Federal Claims Decision

On August 4, 2000, after transfer from the district court to the Court of Federal Claims, Appellants' complaint claimed that three separate governmental actions effected a

taking of their property under the Fifth Amendment: (1) the Comptroller General's *Ford* decision that retroactively applied a two- or three-year statute of limitations to their administrative claims instead of the six-year statute of limitations; (2) the GAO's failure and refusal in the intervening year to apply the original Section 640 to their administrative claims; and (3) Congress's amendment of Section 640 in late 1995 restricting restoration of the six-year limitations period to situations where no overtime was paid at all. In response, the Government asserted that Appellants' case is merely a standard FLSA entitlement case disguised as a Fifth Amendment takings claim. Put differently, the Government argued that Appellants' claim is one for statutory entitlement under the FLSA because the only property allegedly taken was FLSA overtime compensation. The Government also argued that a claim to FLSA overtime compensation is not "property" within the meaning of the Takings Clause, and subsequently moved to dismiss the complaint under Court of Federal Claims Rule 12(b)(6) for failure to state a claim upon which relief can be granted and Court of Federal Claims Rule 12(b)(1) for lack of jurisdiction over the subject matter of the case.

The trial court distilled the parties' arguments to a single issue: whether Appellants' claim involves "property" within the meaning of the Takings Clause of the Fifth Amendment. *Adams*, 2003 U.S. Claims LEXIS 238 at *20. To address that issue, the trial court considered Appellants' claim for underpaid overtime compensation separate from Appellants' administrative claim. Relying on *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed.Cir. 2001) (en banc), the trial court held that a governmental obligation to pay money pursuant to a statute is not a protected "property" interest under the Takings Clause. *Adams*, 2003 U.S. Claims LEXIS 238 at *20. In reaching that holding, the trial court focused its analysis on the identification of a true property interest but concluded

that "[a]ll the [appellants] have identified is a run-of-the-mill claim for liability." *Id.* at *27. Additionally, the court reasoned that even if a statutory right to payment could be considered "property," the Government had not "taken" Appellants' money for its own use; it simply did not pay them because it determined after analysis that they were exempt from the FLSA. *Id.* at *30.

As for Appellants' administrative claim, the court observed that the abolition of a cause of action may rise to the level of a taking, but only if the cause of action secures a "legally protected interest." *Id.* at *40. For that reason, the court concluded that Appellants' administrative claim also must fail, since the interest underlying this claim is not cognizable as a property right protected by the Takings Clause of the Fifth Amendment. *Id.* Moreover, the court noted that the district court and District of Columbia Circuit already had rejected Appellants' due process claims. *Id.* The court concluded, therefore, that no cause of action to protect Appellants' property or procedural rights had been unconstitutionally taken from them. *Id.* at *41. Accordingly, the Court of Federal Claims granted the Government's motion to dismiss and ordered entry of final judgment in favor of the Government.

Appellants timely appealed, arguing that the Court of Federal Claims erred in deciding that they did not have a property interest in either FLSA overtime compensation, or an administrative claim thereto, cognizable under the Takings Clause. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) because the appeal is from a final judgment of the Court of Federal Claims.

II. DISCUSSION

A. Standard of Review

The Court of Federal Claims did not explicitly state whether the motion to dismiss was granted under Rule 12(b)(1) or under Rule 12(b)(6) of the Rules of the Court of

Federal Claims. Nevertheless, it appears that the Government did not present an exclusively jurisdictional argument, which would invoke Rule 12(b)(1). Additionally, the Court of Federal Claims focused on the merits of Appellants' case in its opinion. Therefore, the Court of Federal Claims can best be described as having granted the motion to dismiss under Rule 12(b)(6) of the Court of Federal Claims for failure to state a claim on which relief can be granted.[3]

Dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure is proper only when a plaintiff "'can prove no set of facts in support of his claim which would entitle him to relief.'" *Leider v. United States*, 301 F.3d 1290, 1295 (Fed.Cir.2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed..2d 80 (1957)). In reviewing the Court of Federal Claims' grant of a Rule 12(b)(6) motion, we must assume that all well-pled factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-movant. *See Leider*, 301 F.3d at 1295. Whether the Court of Federal Claims properly dismissed Appellants' complaint for failure to state a claim upon which relief can be granted is a question of law which we review *de novo*. *See id.* (citing *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed.Cir.2000)).

B. The Takings Clause

The Takings Clause of the Fifth Amendment provides, in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. A claimant under the Takings Clause must show that the government, by some specific action, took a private property interest for a public use without just compensation. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

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[3] Rule 12 of the Court of Federal Claims mirrors Rule 12 of the Federal Rules of Civil Procedure.

In evaluating a takings claim, we have developed a two-step approach. First, we determine whether the claimant possessed a cognizable property interest in the subject of the alleged taking for purposes of the Fifth Amendment, *i.e.*, whether the claimant possessed a "stick in the bundle of property rights." *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed.Cir.2000) (internal citation omitted). Second, once we have determined that such a property interest exists, we decide "whether the governmental action at issue constituted a taking of that 'stick.'" *Id.* (citing *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed.Cir.1995)).

In this case, our analysis focuses on the threshold requirement of a recognized property interest, *i.e.*, whether Appellants possessed any cognizable property interests within the meaning of the Takings Clause in either FLSA overtime compensation or in an administrative claim thereto. The Constitution itself neither creates nor defines the property interests that if taken by the government are compensable under the Fifth Amendment. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed..2d 548 (1972). Rather, "existing rules or understandings that stem from an independent source," such as state, federal, or common law, create and define the dimensions of property interests for purposes of establishing a cognizable right and hence a potential taking. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030, 112 S.Ct. 2886, 120 L.Ed..2d 798 (1992). We have observed:

> Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests—life estates and various types of fees—and future interests), and in terms of shared interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there

> are interests in special kinds of things (such as water, and commercial contracts). And property interests play across the entire range of legal ideas.

Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1572 n. 32 (Fed.Cir.1994). In light of the complex nature of property interests and associated rights, we must identify the precise nature of Appellants' takings claim on appeal. Appellants argue, as they did before the Court of Federal Claims, that two specific property interests are implicated, namely, an interest in payment of underpaid overtime compensation according to FLSA rates and an interest in an administrative claim thereto before the GAO. We consider each of these alleged property interests in turn.

i. Do Appellants Possess a Cognizable Property Interest in Their Asserted Right to Underpaid Overtime Compensation According to FLSA Rates?

Appellants argue that as of November 18, 1995, they possessed a valid claim against the Government for six years of underpaid overtime compensation. Appellants contend that when Congress amended Section 640 on November 19, 1995, reducing the limitations period for certain claims from six to two years, the Government confiscated via a *per se* taking four years of their claim for underpaid overtime compensation under the FLSA without just compensation.

Appellants assert that vested property rights may be created by either statute or contract, proceeding on both theories in the alternative. Focusing first on statutory grounds, Appellants contend that they acquired property rights in underpaid overtime compensation under the FLSA for six previous years because such rights vested at the end of each pay period during which they worked hours of overtime, and the statute of limitations was six years. Appellants assert that the Government was obligated as a

matter of law to pay them for these overtime hours at the FLSA rate (*i.e.*, at least one-and-one-half times their regular rate), not at any lesser rate under the FEPA or any other statute. As examples of cases that recognize property interests and derivative rights created by statute, Appellants cite *United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed..2d 48 (1977), *Zucker v. United States*, 758 F.2d 637 (Fed.Cir.1985), and *Kizas v. Webster*, 707 F.2d 524 (D.C.Cir.1983).

We disagree that Appellants own any Fifth Amendment property interest pursuant to the FLSA statute. Appellants confuse a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute.[4] *Larionoff*, *Zucker*, and *Kizas* are inapposite because each involves enforcing a statutory entitlement to compensation for employment, not recognizing the predicate for a takings claim. In *Larionoff*, the Supreme Court considered a soldier's entitlement to a reenlistment bonus under the statutory Variable Reenlistment Bonus Program. 431 U.S. at 866, 97 S.Ct. 2150. Similarly, in *Zucker*, we decided civil servant retirees' entitlement to cost-of-living-adjustments under the Civil Service Retirement Act, while in *Kizas*, the United States Court of Appeals for the District of Columbia Circuit addressed FBI agents' entitlement to a "special preference" as an element of compensation under Title 5 of the United States Code. *Zucker*, 758 F.2d at 639-40; *Kizas*, 707 F.2d at 534-38.

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[4] Generally, entitlements are considered to be government conferred benefits, safeguarded exclusively by procedural due process. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In light of this, entitlements are often referred to as "property interests" within the meaning of the Due Process Clause in cases decided under that clause, but such references have no relevance to whether they are "property" under the Takings Clause.

Appellants alternatively contend that the assertedly applicable FLSA rate of overtime compensation became a contractual right once the work was completed. Appellants rely on a passage from *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 6 S.Ct. 329, 29 L.Ed.. 587 (1885), to support that contention: "But after the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. This contract is a completed contract." *Id.* at 133-34, 6 S.Ct. 329. Pursuing a contract theory, Appellants contend that they acquired vested property rights to the underpaid overtime compensation via an implied contract with the Government formed when they completed the overtime work. For support, Appellants cite to selected cases, such as *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), wherein courts have found that sometimes rights arising out of a contract can be protected by the Takings Clause of the Fifth Amendment.

Appellants' contract theory is without merit. At the outset, Appellants mischaracterize *Fisk*. The plaintiff in *Fisk* served as a Louisiana parish district attorney by appointment, and a municipal law fixed his salary. When the Parish of Jefferson failed to pay his salary for four years, plaintiff sued in state court for recovery, requesting a writ of mandamus to compel the parish to assess and collect a tax for the payment of his salary. The Supreme Court of Louisiana denied the writ based upon a provision of the Louisiana Constitution limiting the power to levy a tax. The plaintiff sought review in the United States Supreme Court, arguing that the Louisiana constitutional provision impaired the obligation of his contract as guaranteed by the Contract Clause of the United States Constitution. *Fisk*, 116 U.S. at 133, 6 S.Ct. 329. The United States Supreme Court agreed, concluding that:

> [the plaintiff's] appointment as district attorney was lawful and was a request made to him by the proper

> authority to render the services demanded of that office. He did render these services for the parish, and the obligation of the police jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury. There was here wanting no element of a contract.

Id. at 134, 6 S.Ct. 329. Thus, *Fisk* involved an unconstitutional provision of state law and was decided under the Contracts Clause, not the Takings Clause.

Appellants cite no case law to show that either the United States Supreme Court or this court would view a takings claim against the United States in the same light. Like all federal employees, Appellants served by appointment. The terms of their employment and compensation, consequently, were governed exclusively by statute, not contract. They had not, and could not have, entered into any separate agreement with the Government, express or implied, for additional overtime compensation beyond that to which they were entitled by the applicable statute. Hence, contrary to Appellants' characterization of their entitlement to underpaid overtime compensation as based on an implied contract, Appellants had nothing more than a unilateral expectation to receive FLSA, rather than FEPA, overtime compensation for their hours of overtime work. Indeed, the District of Columbia Circuit previously recognized that

> federal workers serve by appointment, and their rights are therefore a matter of legal status even where compacts are made. In other words, their entitlement to pay and other benefits must be determined by reference to the statutes and regulations governing [compensation], rather than to ordinary contract principles. Though a distinction between appointment

> and contract may sound dissonant in a regime accustomed to the principle that the employment relationship has its ultimate basis in contract, the distinction nevertheless prevails in government service. Applying these doctrines, courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel. These cases have involved, *inter alia*, promises of appointment to a particular grade or step level, promises of promotion upon satisfaction of certain conditions, promises of extra compensation in exchange for extra services, and promises of other employment benefits.

Kizas, 707 F.2d at 535 (citations and internal quotations omitted).

Furthermore, Appellants' reliance on *Lynch* is misplaced. In *Lynch*, despite the government having duly issued the insured a lawful insurance policy, Congress abrogated by legislation all such policies in force. Here, unlike in *Lynch*, the Government did not enter into any private agreement with Appellants regarding the terms or rates of Appellants' overtime compensation, and Congress did not abrogate any such contract. The Government, in fact, could not have contracted to pay Appellants for overtime work at a rate of at least one-and-one-half their regular rate of pay because, like all government employees, Appellants' compensation is governed exclusively by statute. Consequently, as previously stated, Appellants cannot be contractually entitled to overtime compensation at the rate specified under the FLSA or any other pay statute. When the Government and private parties contract, as in *Lynch*, the private party usually acquires an intangible property interest within the meaning of the Takings Clause in the contract. The express rights under this contract are just as concrete as the inherent rights

arising from ownership of real property, personal property, or an actual sum of money. Here, no contract established in Appellants a property interest in overtime compensation at a particular rate under the FLSA. Because Appellants cannot show that they had a contract with the Government, they are not entitled to Takings Clause protection under *Lynch*.

Extending its contract theory, Appellants particularly equate the Government's alleged statutory obligation to pay them overtime compensation at the FLSA rate with a debt owed by a debtor to a lender. They use the word "debt" repeatedly, but they distort the meaning of this word. That is, Appellants claim that when they performed the overtime work, the Government incurred a debt commensurate with paying them for their labor at the FLSA rate, not a lesser rate under an alternative overtime pay statute. Appellants contend, in turn, that paying this "debt" is akin to paying the insurance policy proceeds in *Lynch* or the gold standard bonds in *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

Appellants' argument is wholly unpersuasive. In *Lynch*, an insured purchased a war insurance policy from the United States, effectively lending money to the Government in exchange for future payment on the value of the policy at the time of the insured's death. 292 U.S. at 574-75, 54 S.Ct. 840. Likewise, in *Perry*, the bond owner purchased a gold bond from the United States, also in effect lending money to the Government in exchange for payment of the principal amount of the bond plus interest in gold coins. 294 U.S. at 346-47, 55 S.Ct. 432. In both cases, the Government agreed with the lenders, *i.e.*, the insured and the bond owner, to make future payment of either the policy amount in the case of a war insurance policy or the bond principal plus interest in the case of the gold bond in exchange for the immediate use of their money. Also, the Government's "debt" to the insured and the bond owner was evidenced in a legal

instrument issued by the Government to acknowledge and create the debt, respectively an insurance policy and a bond certificate. Here, as stated above, the Government and Appellants did not, and could not have, agreed that the Appellants would "loan" their underpaid overtime compensation to the Government in exchange for a "debt" owed by the Government to them. Additionally, the Government issued no underlying legal instrument evidencing the Government's agreement to a loan. The only legal instrument, the Form 50, rather than acknowledging Appellants' right to be paid for overtime at the rate specified in the FLSA, instead indicated that the FLSA did not apply to them. Thus, Appellants are not in the same position as the insured and bond holder in *Lynch* and *Perry*, but instead are in the opposite position. Accordingly, as the Government argues, Appellants are not owed a debt; they have nothing more than a bald allegation that they are owed underpaid overtime compensation by the Government.

Lastly, Appellants argue that the Court of Federal Claims misunderstood and misapplied our *Commonwealth Edison* decision. Appellants assert that this court in *Commonwealth Edison* did not intend to suggest by using the phrase "specific fund of money"[5] that the Takings Clause applies only when a particular sum or account is at stake. Rather, Appellants contend that this court used the phrase merely to distinguish between an obligation imposed by the Government to pay money to achieve a regulatory objective, as in that case, and confiscation of specific money

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5 The phrase "fund of money" as used in *Commonwealth Edison* derives from Justice Breyer's dissent in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). Justice Breyer stated: "But the monetary interest at issue there [referring to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)] arose out of the operation of a *specific, separately identifiable fund of money*." *E. Enters.*, 524 U.S. at 555, 118 S.Ct. 2131 (emphasis added).

by the Government, as in a classic *per se* taking, which Appellants argue occurred here.

New England Legal Foundation ("NELF"), as amicus curiae,[6] advances a similar argument, going so far as to assert that the alleged underpaid overtime compensation is a "fund of money." NELF reaches this position by advocating that "[t]he key to a 'fund of money' is that it must be 'specific' and 'separately identifiable,' not that it be kept in a separate account." In other words, NELF appears to claim that as long as the money allegedly owed is both "specific" and "separately identifiable," then it qualifies as a protected "fund of money." NELF contends that Appellants theoretically could calculate the amount of underpaid overtime compensation by multiplying the total number of overtime hours by the applicable overtime rate under the FLSA. Accordingly, NELF asserts that the amount of underpaid overtime compensation due to Appellants is both "specific" and "separately identifiable," even if it is not maintained in a separate account by the Government.

The Government seeks to refute Appellants' and NELF's positions, arguing that the Court of Federal Claims was correct that an ordinary statutory obligation to pay money can never constitute property for purposes of the Takings Clause. The Government asserts that Appellants and NELF plainly ignore the holding in *Commonwealth Edison* and attempt to distinguish that case based on differences between the facts there and those here that are immaterial. Additionally, the Government claims that NELF fails to explain how the alleged underpaid overtime compensation is any more a "fund of money" than the

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[6] The Federal Law Enforcement Officers' Association ("FLEOA") also presented an amicus curiae brief in support of Appellants' position. However, the FLEOA did not address the substance of a takings analysis, but instead focused primarily on the unfairness of not granting Appellants' relief.

obligation to pay money in *Commonwealth Edison*. Indeed, the Government further contends the allegedly underpaid overtime compensation here is even less a "specific" and "separately identifiable" fund than the monetary obligation in *Commonwealth Edison*.

Like the Government, we do not read *Commonwealth Edison* in the same light as either Appellants or NELF. In *Commonwealth Edison*, Congress imposed a monetary assessment in the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (codified as amended in various sections of 42 U.S.C.), on all domestic utilities such as Commonwealth Edison that used uranium re-processing facilities operated on their behalf by the United States Department of Energy. Under the Energy Policy Act, the Government was to use the revenue generated by the assessment to fund part of the cost of environmental remediation of its contaminated re-processing facilities. We held that Congress did not effect a taking within the meaning of the Fifth Amendment by imposing a statutory obligation to pay money on the utility companies. *Commonwealth Edison*, 271 F.3d at 1340. In reaching this conclusion, we followed the views of a majority[7] of the justices of the Supreme Court in *Eastern Enterprises*. *Id.* at 1338. In that case, the Supreme Court addressed the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, codified at 26 U.S.C. §§ 9701-9722 (the "Coal Act").

The Coal Act required certain coal mine operators to fund future health benefits of former coal mine employees of defunct companies, even though the paying, extant companies never employed them. Writing for the plurality,

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[7] Notably, there was not a majority opinion of the Supreme Court in *Eastern Enterprises*. By referring to "a majority" view herein, we mean those views expressed in the concurring opinion of Justice Kennedy together with those expressed in the dissenting opinion of Justices Stevens, Souter, Ginsburg, and Breyer.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, concluded that the retroactive impact of the Coal Act as applied to Eastern Enterprises was an unconstitutional taking because it placed a "severe, disproportionate and extremely retroactive burden" on the extant coal operators. *E. Enters.*, 524 U.S. at 538, 118 S.Ct. 2131. While concurring in the result, Justice Kennedy disagreed with the plurality's conclusion that an obligation to pay money can support a taking, because:

> [the Coal Act] does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Id. at 540, 118 S.Ct. 2131. Indeed, the four dissenters, namely, Justices Stevens, Souter, Ginsburg, and Breyer, specifically "agreed that the Takings Clause was not implicated because 'the private property upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property .... This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money.'" *Id.* at 554, 118 S.Ct. 2131. We thus held in *Commonwealth Edison* that "the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison*, 271 F.3d at 1340. Given the precise language found in Justice Kennedy's concurrence and the dissent, we premised our holding in *Commonwealth Edison* not on whether the statutory obligation was imposed for purposes of regulation or confiscation as suggested by Appellants, but rather on the nature of the interest in dispute (*i.e.*, a legally-

recognized property interest such as one in real estate, personal property, or intellectual property, versus an ordinary obligation to pay money). The former is protected as property under the Takings Clause, whereas the latter is not because it lacks any foundation in property law.

We also took care in *Commonwealth Edison* to distinguish the specific funds implicated in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), as legitimate property interests from statutory obligations to pay money. 271 F.3d at 1338. Particularly, we noted that each contributor's share of interest income generated by funds held in a specific, consolidated Interest on Lawyers Trust Account, commonly known as an IOLTA account, is the private property of that contributor for purposes of the Takings Clause. *See Phillips*, 524 U.S. at 160, 118 S.Ct. 1925. Similarly, we observed that each contributor's share of interest generated from deposits into a specific, consolidated interpleader account is a property interest of that contributor within the meaning of the Takings Clause. *See Webb's Fabulous Pharmacies*, 449 U.S. at 164-65, 101 S.Ct. 446. In light of our use of the term "specific" to mean an actual sum of money representing interest derived from ownership of particular deposits in an established account, as opposed to some abstract sum of money capable of being calculated, NELF's argument cannot stand.

While it may be debatable to what extent the precise holding in *Commonwealth Edison* controls the instant case, this decision certainly provides the principle for determining how to treat the instant claim of a statutory entitlement to money under the Takings Clause. Both the Government and the Court of Federal Claims correctly noted that *Commonwealth Edison* clearly suggests that no statutory obligation to pay money, even where unchallenged, can

create a property interest within the meaning of the Takings Clause. Here, in Appellants' claim that the Government is obligated to pay underpaid overtime compensation under the FLSA, we are faced with a statutory obligation to pay money, just as was implicated in *Commonwealth Edison*. Hence, based upon the principle of *Commonwealth Edison*, Appellants do not possess a property interest under the Takings Clause.

What is more, we conclude that a statutory right to be paid money, at least in the context of federal employee compensation and benefit entitlement statutes, is not a property interest for purposes of the Takings Clause. Appellants have neither cited, nor are we independently aware of, any appellate court decision recognizing a statutory obligation to be paid money as a property interest grounded in property law. We decline to treat a statutory right to be paid money as a legally-recognized property interest, as we would real property, physical property, or intellectual property. Instead, we view it as nothing more than an allegation that money is owed. We thus conclude that Appellants cannot prove any set of facts that could support granting their requested relief.

ii. Do Appellants Possess a Cognizable Property Interest in an Administrative Claim to Underpaid Overtime Compensation Before the GAO?

Appellants argue, but only in a cursory fashion, that as of November 18, 1995, they owned a valid administrative claim before the GAO to recover their unpaid overtime compensation.[8] They contend that when Congress amended Section 640 on November 19, 1995, the Government entirely

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[8] Appellants devoted little attention to this issue, discussing it only in a handful of paragraphs in their opening and reply briefs. Consequently, we view it as a secondary argument and treat it accordingly in this opinion.

extinguished their administrative claim to underpaid overtime compensation, effecting a *per se* taking of their private property without just compensation. Appellants rely on *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478 (Fed.Cir.1984), to support their argument that their GAO claim, like certain causes of action, is "property" within the meaning of the Takings Clause. What is more, Appellants maintain that it was immaterial that their claim had not yet been decided by the GAO when Section 640 was amended.

Although we agree with Appellants that sometimes a cause of action may fall within the definition of property recognized under the Takings Clause, we observe, like the Court of Federal Claims, that precedent has limited the application of the Takings Clause to cases in which the cause of action protects a legally-recognized property interest. *See, e.g., Cities Serv. Co. v. McGrath*, 342 U.S. 330, 72 S.Ct. 334, 96 L.Ed.359 (1952) (holding that seizure by Alien Property Custodian of interest represented by bond or debenture without seizure of instrument itself is unconstitutional taking of obligor's property unless he is assured that he has claim against United States for recoupment in the event of subsequent recovery against him in foreign court by holder in due course of debenture). Such is not the case here because, as discussed in detail above, the underlying subject matter of Appellants' alleged administrative claim fails to qualify as a recognized property interest under the Takings Clause. Appellants' reliance on *Alliance of Descendants* is utterly misplaced because the cause of action there was to recover compensation for an interest in land, a property interest cognizable under established takings jurisprudence because land is, beyond question, property under state and common law. *Alliance of Descendants*, 37 F.3d at 1481. Appellants have not cited any precedent finding such a property interest in a claim of Government liability before an administrative agency.

Hence, we conclude that Appellants do not possess a cognizable property interest in any part of their administrative claim before the GAO.

iii. *Per Se* Takings Argument

Because we agree with the Court of Federal Claims that Appellants do not possess any cognizable property interest within the meaning of the Takings Clause, we necessarily hold that the Government could not commit a *per se* taking without just compensation any more than it could commit a regulatory or any other kind of taking.

III. CONCLUSION

The order of the Court of Federal Claims granting the Government's motion to dismiss and the resulting judgment for the Government are

AFFIRMED.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 00-447 C.
(Filed: August 11, 2003)

STEPHEN S. ADAMS, *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

OPINION AND ORDER

Block, *Judge*:

To James Madison, rightly termed the Father of the Constitution, "that alone is a *just* government which impartially secures to every man whatever is his *own*."[9] What must be secured by government is personal security and private property, the protection of which was considered by the Founders of our Republic to be the centerpiece of civil society and the source of all other liberties. Although originally opposed to a Bill of Rights, it was Mr. Madison who ultimately penned and fought for its ratification. The Fifth Amendment to our Constitution was in part adopted to protect private property from arbitrary governmental action.

Two clauses of this amendment are pertinent in this case. First, the Due Process Clause, which protects, "life, liberty, or property" from being seized without "due process of law." Second, the Takings Clause, which proscribes the

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[9] James Madison, *Essay on Property*, reprinted in Kurland, *The Founders' Constitution*, Vol. 1, Ch. 16 Document 23, University of Chicago Press (1987) (emphasis original).

taking of private property "for public use" without "just compensation." The District Court for the District of Columbia and the D.C. Circuit have already opined as to the applicability of the first clause. This court is asked to do the same for the latter.

More succinctly, this case revolves around the interplay between the Takings Clause and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1994) (FLSA), which in part mandates the payment of "overtime" wages beyond the set rate of pay. Plaintiffs bring suit on the claim that the Takings Clause was violated by a congressional amendment to the FLSA's statute of limitations, which was applied to them retroactively and denied them their alleged entitlement to overtime compensation. Defendant moves to dismiss this claim on grounds of either a lack of subject matter jurisdiction or because it fails to state a claim upon which relief may be granted.

The central issue facing the court is whether the statutorily mandated overtime pay falls within the meaning of "property" under the Fifth Amendment's Takings Clause. A collateral issue is whether the nullification by Congress of plaintiffs' FLSA overtime payments amounts to a unconstitutional taking of a "cause-of-action" to sue to protect property or a right recognized by law. For the reasons set forth below, the court finds plaintiffs possess no property right cognizable under the Takings Clause of the Fifth Amendment, and therefore, the defendant's motion to dismiss must be granted.

I. Facts

The facts, unless otherwise noted, are undisputed and are drawn from the complaint, defendant's motion to dismiss, plaintiffs' motion in opposition, and the appendices attached thereto.

This case is brought on behalf of nearly 14,000 employees of the Bureau of Alcohol Tobacco and Firearms

(ATF), Drug Enforcement Agency (DEA), Internal Revenue Service (IRS), United States Customs Service (USCS), and United States Secret Service (USSS). Each plaintiff seeks over $ 10,000 in FLSA overtime back pay from the United States government.

Claims for back pay brought under the FLSA are governed by the Portal-to-Portal Act which establishes a two year statute of limitations for non-willful violations, and a three year statute of limitations for willful ones. 29 U.S.C. § 255(a) (2000). The importance of the statutory limitations period is significant in back pay cases such as this because the statute of limitations determines how many years of compensation each claimant receives. Since these are continuing claims, a separate cause-of-action accrues each payday. Thus, a six year statute of limitations means that an employee could recover six years of back pay or overtime compensation from the date of filing; whereas, a two year statute would limit recovery to only two years worth of such compensation. *See Adams v. Hinchman*, 154 F.3d 420, 422 (D.C. Cir. 1998). It thus is this difference in potential recovery that is at issue in this case.

In 1978, the General Accounting Office (GAO) issued *In re Transportation Systems Center*, 57 Comp. Gen. 441 (1978). The *In re Transportation Systems Center* opinion altered the statute of limitations period for claims brought before an administrative agency, as opposed to ones brought before the courts of law. The Comptroller General reasoned that the language of the Portal-to-Portal Act limited its applicability to "actions at law" which meant the Act only applied to those actions brought before the courts, rather than those brought before an administrative agency. *Id.* As a result, back pay cases under the FLSA brought before the GAO were governed by the Barring Act's six year statute of limitations (31 U.S.C. § 3702(b) (2002)), while FLSA back pay cases brought to the courts were still governed by the

FLSA's two or three year limitations period (29 U.S.C. § 255(a) (2002)).

Such was the state of affairs between 1990 and 1995 when plaintiffs simultaneously filed both administrative claims, and claims in this court for the FLSA overtime back pay allegedly owed them. *Adams v. United States*, 27 Fed. Cl. 5 (1992).[10] Due to the simultaneous pendency of both types of claims, the GAO stayed the administrative claims pending the outcome of the claims in the this court. During the time of the stay, however, the Comptroller General issued another opinion, *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994) ("*Ford* decision"), instructing the GAO to apply the two or three year statute of limitations to all FLSA administrative claims. This change time barred many of plaintiffs' claims. As a result, plaintiff wrote to the Comptroller General urging him to reverse the *Ford* opinion or, at least, not apply it to plaintiffs. The Comptroller General allegedly did not respond.

A month after plaintiffs' missive was mailed to the GAO, Congress effectively reversed in part the Comptroller General's *Ford* decision with passage of section 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub. L. No. 103-329, 108 Stat. 2383, 2432 (1995). Section 640 mandated a six year statute of limitations for administrative claims filed *prior* to June 30, 1994, but a two year statute of limitations remained for claims filed *after* June 30, 1994.[11] Since the Comptroller

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[10] The court concluded that some of the plaintiffs employed by the named agencies were exempt from the FLSA's overtime compensation provisions, while others were not. *Id.* Thereafter, in 1994, a partial settlement was reached with the United States as to those employees the court ruled were exempt from the overtime provisions.

[11] The precise text of the statute read:

> In the administration of Section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal Employee

General's decision applied retroactively, the claims of nearly 3,000 plaintiffs who fell into this latter category became time barred.

Plaintiffs then wrote to the GAO requesting a meeting to discuss the effect of section 640 on the resolution of plaintiffs' claims. The GAO responded by acknowledging that section 640 modified the *Ford* decision, but instructed the plaintiffs to exhaust their administrative claims before the particular agency (the ATF or the DEA, for example) before commencing an action before the GAO. Plaintiffs reluctantly agreed and took their claims to the ATF, DEA, IRS, USCS and the USSS. On January 27th, 1995, Stephen J McHale, attorney for the Department of Treasury (the parent agency of the ATF, DEA, IRS, USCS, and USSS), responded to plaintiffs stating that section 640 was clear and therefore plaintiffs' claims filed after June 30, 1994 were time barred. Plaintiffs thereafter received letters from each individual agency reiterating Mr. McHale's decision.

Having obtained adverse decisions from the individual agencies, plaintiffs sought review by the GAO. In plaintiffs' appeal letter, they argued: (1) plaintiffs' claims filed before June 30, 1994 should be immediately settled[12] by the GAO, and (2) as for plaintiffs' claims filed after June 30, 1994, they too should be settled since the GAO did not have authority to retroactively shorten the statute of limitations under the

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under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) for claims filed before June 30, 1994.

12 The term "settled" is a term of art in this area of law and means "to administratively determine the validity of that claim. ... Settlement includes the making of both factual and legal determinations. The authority to settle and adjust claims does not, however, include the authority to compromise claims." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-6 (1982); *see also Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219, 60 L. Ed. 609, 36 S. Ct. 321 (1916).

Barring Act. Again, allegedly no response was received from the GAO.

During the pendency of the appeal to the GAO, two significant occurrences took place, which make the facts of this is case somewhat byzantine. First, plaintiffs intervened in a related case (*In re Marvin B. Atkinson*, 1996 U.S. Comp. Gen. LEXIS 27 (Jan. 29, 1996) ("*Atkinson* opinion")) in which a U.S. Customs agent brought an FLSA back pay claim before the GAO. The Customs agent's claim was filed January 1st, 1994—approximately 5 months before section 640's June 30, 1994 cut-off date—and sought six years of FLSA back pay from the government. The GAO, however, decided to withhold its opinion in *Atkinson* because the agency thought Congress would soon once again amend section 640 and thereby potentially render the GAO's decision moot. This, in turn, meant that the agency would refrain from "settling" plaintiffs' similar claims for the same reason.

The second significant occurrence took place on November 19, 1995, when the GAO's decision to withhold the *Atkinson* opinion proved prescient and Congress again amended section 640 as follows:

> This section shall not apply to any claims where the employee has received any compensation for the overtime hours worked during the period covered by the claim under any provision of law ... or to any claim for compensation for time spent commuting between the employees residence and duty station.[13]

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[13] When this amendment to section 640 was introduced, Representative Lightfoot made the following statement concerning the need for the amendment: "[t]he problem is that [the unamended statute] will cost as much as $460 million ... the conferees were faced with a choice—either pay hundreds of millions for work done many years ago ... or give the Federal workers the same rights as their private sector counterparts. ... We included language providing for the same treatment of public and private workers ... not just because it costs a lot of money,

The effect of this Amendment was to further limit plaintiffs' potential recovery. Not only were plaintiffs still restricted to the two year statute of limitations for claims filed after June 30, 1994, but the new amendment also retroactively eliminated plaintiffs' substantive rights under the FLSA to recover overtime pay for time spent commuting or to recover FLSA overtime if they had already received overtime pay under another provision of law.

The sum and substance of all of this is that plaintiffs can now be divided into two distinct groups: (1) those who filed their claims *after* June 30, 1994, and therefore, fall under the two or three year limitations period GAO applies to FLSA claims, and (2) those who filed their claims *prior* to June 30, 1994, but received overtime compensation under other provisions of law or claim overtime for time spent commuting, and are, therefore, excluded from coverage under amended section 640.

Plaintiffs filed a claim in the District Court for the District of Columbia challenging the constitutionality of section 640 of the 1995 Act, as well as the subsequent amendment to that section, under the Due Process and Takings Clauses of the Fifth Amendment. *Adams v. Bowsher*, 946 F.Supp. 37, 44 (D.D.C. 1996), *aff'd in part, vacated in part, sub nom., Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158, (1999). Plaintiffs due process arguments were based on the dual premise that retroactive application of both section 640 and the amendment to that section nullified plaintiffs' pending back pay claims and denied them their earned but unpaid FLSA overtime compensation.

The district court concluded that those plaintiffs who filed their claims after June 30, 1994 had no property interest in back pay claims because those claims were not

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but because it is fair." 141 CONG. REC. H12376 (Nov. 15, 1995); *see also Adams*, 154 F.3d 420, 425 (D.C. Cir. 1998).

reduced to judgment. *Adams*, 946 F. Supp. at 44. Nor, the district court also concluded, was this group of plaintiffs denied due process because unpaid overtime compensation was not a property interests as defined by the Due Process Clause. *Id.* at 41-42. As to the other category of plaintiffs, those who filed their claims prior to June 30, 1994, the district court concluded that due process was served because the retroactive application of the legislation was furthered by a rational purpose. *Id.* (citing *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).[14]

As for the Takings Clause argument, the district court, applying the three-part test for regulatory takings, denied plaintiffs' claim. *Id.* at 20 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-225 (1986)).[15] What weighed heavily against the plaintiffs, according to the trial court, was the lack of a showing that any individual plaintiff would suffer any significant economic detriment and would lose merely "an entitlement that only in recent years had been discovered." *Id.* at 20.

On appeal, the D.C. Circuit essentially affirmed the district court's due process, equal protection, and statutory analysis. *Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998) (per curium). The court held that regardless of whether plaintiffs' possessed a property interest in either the pending administrative claims or the overtime back pay, any

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[14] The district court also denied both plaintiffs' equal protection argument based on the implied equal protection component of the Due Process Clause of the Fifth Amendment (*see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)), as well an Administrative Procedure Act claim primarily challenging the GAO's *Ford* opinion. *Adams*, 946 F. Supp. at 22-26.

[15] "[T]he Supreme Court identified the following three factors: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered "with distinct investment-backed expectations, and (3) the character of the government action." *Adams*, 946 F. Supp. at 19-22. It is interesting to note that the district court in applying this balancing test for regulatory takings, merely assumed, but never analyzed, the existence of a property interest cognizable under the Takings Clause.

hypothetical property interest was properly extinguished because the retroactive economic legislation, that is, the amendment to section 640, had a legitimate legislative purpose and was furthered by rational means. *Id.* at 424-425. Accordingly, the court never reached the issue of whether plaintiffs' alleged property interest was cognizable under the Due Process Clause.

As to the takings claim, the court held that the district court lacked jurisdiction because the Tucker Act, 28 U.S.C. § 1491(a)(1), confers on the Court of Federal Claims exclusive jurisdiction over takings claims above $ 10,000. *Id.* at 425-426. Consequently, the appellate court remanded the takings claim to the district court with orders to transfer the case here.

As a result, plaintiffs filed the present complaint alleging that three separate actions effected a taking under the Fifth Amendment: (1) the GAO's *Ford* decision that retroactively limited the statute of limitations for administrative claims to two years, (2) the GAO's decision to withhold "settlement" on those of plaintiffs' claims filed before June 30, 1994 during the pendency of the *Atkinson* decision, and (3) Congress' amendment of section 640 which limited overtime and commuting compensation.

Defendant moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) of the Court of Federal Claims (RCFC). Oral argument was heard on April 28, 2003, in Washington, D.C. Further supplemental briefing was requested by plaintiffs and granted by the court. Thereafter, plaintiffs also sought permission to file supplemental authority, which was also granted by the court.

II. Discussion

A. Standard of Review

RCFC 12(b)(6) mandates dismissal of a case where the plaintiff fails to state a claim upon which relief can be

granted. When faced with a Rule 12(b)(6) motion, the court should grant the motion only if "it appears beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) (quoting *Conley v. Gibson*, 355 U.S. 41, 46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)); *Consolidated Edison Co. v. O'Leary*, 117 F.3d 538, 542 (Fed. Cir. 1997), *cert. denied sub nom. Consolidated Edison Co. v. Pena*, 522 U.S. 1108, 140 L. Ed. 2d 103, 118 S. Ct. 1036 (1998). The facts must be viewed in a light most favorable to the plaintiff. *Papasan v. Allain*, 478 U.S. 265, 283, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

RCFC 12(b)(1) directs dismissal when the court lacks jurisdiction over the subject matter of the case. When deciding on a motion to dismiss based on lack of subject matter jurisdiction, much like a Rule 12(b)(6) motion, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *E.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Ho v. United States*, 49 Fed. Cl. 96, 100 (2001), *aff'd*, 30 Fed. Appx. 964 (Fed. Cir. 2002).

Conversely, unlike a Rule 12(b)(6) motion, when hearing a motion under Rule 12(b)(1), the court can consider matters outside the pleadings. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994) ("[i]n establishing predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrinsic to the pleadings, including affidavits' and deposition testimony"). Furthermore, unlike

a Rule 12(b)(6) motion, a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), may be raised by the court *sua sponte* at any time. *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998) (quoting *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993), *reh'g denied* (1993)).

B. Are Statutory "Earned" Overtime Payments Property?

Defendant essentially makes two arguments, only the latter of which is really determinative. The first is that plaintiffs' case is really an FLSA case disguised in Fifth Amendment rubric. This is so, defendant argues, because the property allegedly taken and the damages resulting therefrom are plaintiffs' FLSA overtime payments. As such, the claim is in essence one for statutory entitlement under the FLSA and, regardless of what the disputed time limitations period should have been for plaintiffs' administrative claims, the claim before this court is time barred under the two year limitations period for FLSA claims in the Court of Federal Claims under 29 U.S.C. § 255(a).[16] Defendant's second argument, which when reformulated as a question presents the core issue in this case, is that plaintiffs' FLSA overtime payments do not

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16 This provision provides that:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.] ....
>
> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued ...

The defendant correctly notes that this limitations provision constitutes a waiver of sovereign immunity. *See Saraco v. United States*, 61 F.3d 863, 865-866 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996).

constitute property within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution.[17]

Nevertheless, the court believes defendant's arguments are topsy-turvy, for only if unpaid statutorily mandated overtime does not constitute property within the meaning of the Fifth Amendment's Takings Clause, is plaintiffs' claim one solely under the FLSA. If this is so, then indeed plaintiffs' hypothetical FLSA claim might very well be time barred. Thus, the issue squarely before the court involves the definition of property under the Takings Clause of the Constitution's Fifth Amendment.

As Judge Plager of the Federal Circuit observed: "A man's home may be his castle, but that does not keep the Government from taking it. As an incident to its sovereignty, the Government has the authority to take private property for a public purpose." *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). The Takings Clause of the Fifth Amendment, however, prohibits the government from "taking property for public use" unless it provides "just compensation." U.S. CONST. amend. V. What constitutes property is the initial determination

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[17] Defendant also asserts that this case is barred under the doctrine of collateral estoppel, or issue preclusion, since the issues presented were decided by the D.C. Circuit in the preceding litigation. This court rejects that argument, however, under a well established exception to collateral estoppel that blocks the doctrine's applicability where the party against whom preclusion is sought could not, as a matter of law, have raised the issue in the prior litigation. Since this court has exclusive jurisdiction over takings claims above $10,000, neither the D.C. District Court nor the D.C. Circuit would have jurisdiction over plaintiffs' claims. As a result, plaintiffs could not, as a matter of law, have raised their takings claims in the prior litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) (noting that collateral estoppel is inappropriate where "the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action"); *See also Golden Pac. Bank Corp v. United States*, 15 F.3d 1066, 1073-1074 (Fed. Cir.), *cert. denied*, 513 U.S. 961, 115 S. Ct. 420, 130 L. Ed. 2d 335 (1994).

triggering application of the Takings Clause to a claim. Indeed, the Federal Circuit explicitly requires defining the relevant property interest as the first of a two-step approach to takings claims. "'First, a court determines whether the plaintiff possesses a valid interest in the property affected by the governmental action, *i.e.*, whether the plaintiff possessed a 'stick in the bundle of property rights.'" *Boise Cascade Corporation v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002) (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (internal citation omitted)). If so, "the court proceeds to the second step, determining 'whether the governmental action at issue constituted a taking of that 'stick.'" *Id.* (quoting *Karuk Tribe of Cal.* 209 F. 3d at 1374).

Concerning step one, defendant contends that plaintiffs' claim must fail because the claim is for money and that money does not constitute property within the Fifth Amendment's Takings Clause, citing *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 37-42 (2000). Def's Mot. to Dismiss at 14. Plaintiffs respond with a plethora of arguments, employing a shotgun approach with the hope that one may very well hit the target.

Plaintiffs' first shot is to distinguish *Commonwealth Edison Co.* as a case involving a government imposed payment, while plaintiffs claim involves an unlawful taking of labor, and that *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55 (2nd Cir. 1984) establishes that the U.S. Department of Labor recognizes this precept. Tr. at 49-52; Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss at 22. Plaintiffs' second blast is the contention that their claim falls under the Supreme Court's holdings in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), *United States v. Larionoff*, 431 U.S. 864 (1977), *Armstrong v. United States*, 364 U.S. 40 (1960), and, more recently, *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). *Id.* at 27; Pl.'s

Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 1-4. As explained below, all these arguments misfire. Plaintiffs' last shot is the argument that the retroactive abolition of plaintiffs' overtime payments really is akin to a taking of a cause-of-action securing either a property interest or a right recognized by law. Pl.'s Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 9-10. This argument misses the mark *and* the target.

In *Commonwealth Edison Co.*, the primary issue was the constitutionality under the Fifth Amendment's Due Process and Takings Clauses of the Energy Policy Act of 1992 which imposed a monetary assessment on domestic utilities for the remediation of the government's uranium enrichment facilities operated by the U.S. Department of Energy. *See* 42 U.S.C. § 2297g *et seq.* (2002). This court concluded that the imposition of the special assessment was an obligation to pay money, which did not constitute a protected property interest for Takings Clause purposes. *Commonwealth Edison Co.*, 46 Fed. Cl. at 37-42. The court also rejected the due process exaction arguments. *Id.* at 45. Because of the many companion cases pending in the Court of Federal Claims, the Federal Circuit after oral argument *sua sponte* determined to decide the case *en banc*. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001).

In upholding the trial court, the Federal Circuit held that an obligation to pay money is not a protected property interest under the Takings Clause. In so holding, the court relied upon the view of the majority of justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In this case the Supreme Court confronted the constitutionality of the retroactive liability provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701 *et seq.* (2002) ("Coal Act"). The Coal Act required certain coal operators

to fund future health benefits of current and former coal mine employees.

The Federal Circuit noted that a plurality of the Supreme Court concluded that the retroactive impact of the Coal Act resulted in an unconstitutional taking of property because it placed a "severe, disproportionate and extremely retroactive burden" on various coal operators such as Eastern. *Id* at 1336 (quoting *Eastern Enters.*, 524 U.S. at 538 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., Scalia and Thomas, J.J.)). But the Federal Circuit also observed that five justices rejected the theory that an obligation to pay money constitutes a taking because such an obligation is not the same thing as a taking of a discreet property interest.[18] *Id.* at 1339. "Thus five justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority." *Id.* (citing several sister circuits for the same proposition: *Parella v.*

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[18] In his concurring opinion, Justice Kennedy disagreed with the plurality's conclusion that the Coal Act resulted in an unconstitutional taking of property because while the Coal Act may impose a staggering financial burden on the petitioner:

> it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

Eastern Enters., 524 U.S. at 540. In dissent, Justices Stevens, Souter, Ginsberg, and Breyer similarly agreed that the case did not fall within the protection of the Takings Clause because "the 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. ... This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money ...." *Id.* at 554 (Stevens, Souter, Ginbsurg, and Breyer, J.J., dissenting).

Ret. Bd. of the R.I. Employees' Retirement Sys., 173 F.3d 46, 58 (1st Cir. 1999); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3rd Cir.), *cert. denied*, 528 U.S. 963, 120 S. Ct. 396 (1999); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117, 120 S. Ct. 936 (2000)).

Indeed, prior to the plurality's decision in *Eastern Enterprises*, it was well-accepted that an obligation to pay money does not constitute a taking. *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 6 n.9, 110 S. Ct. 387 (1989) (holding that a federal statute requiring the payment of a portion of an arbitral award from the Iran-United States Claim Tribunal to the United States government did not violate the Takings Clause because, in part, "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible"); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir.), *cert. denied*, 498 U.S. 811, 111 S. Ct. 46 (1990) (holding that Uranium Mill Tailings Radiation Control Act's requirement that uranium producers spend large sums to clean up uranium tailings piles did not constitute an unconstitutional taking of property under the Takings Clause because there is no allegation "of a physical taking of any of its property .... [Uranium producer] alleges only that it will be required to spend sums of money for reclamation of tailings and mill decommissioning").

One distinction, this court notes, is that every one of these "obligation to pay" cases involves private parties' obligation to pay pursuant to either a federal statute or regulation, whereas the case at bar is the very reverse—it is the government that is alleged to have an obligation to pay money (here FLSA alleged "earned" overtime to multiple private parties). Yet this is a distinction without a difference. The analysis turns on the identification of a

discreet property interest. All the plaintiffs have identified is a run-of-the-mill claim for liability. As the Federal Circuit in *Commonwealth Edison Co.* put it: "[W]hile a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money ... does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Commonwealth Edison Co.*, 271 F.3d at 1340.

This conclusion by the Federal Circuit that a specific fund of money need be the subject of a takings claim naturally leads to consideration of plaintiffs' argument that such Supreme Court cases as *Webb's Fabulous Pharmacies*, *Armstrong*, and the recent *Brown* decision, support their cause. Far from helping plaintiffs, however, these precedents are wholly consistent with *Commonwealth Edison Co.* because they involve either specific sums of money or discreet property interests recognized under state or common law. *See Brown v. Legal Foundation of W shington*, 123 S. Ct. 1406 (2003) (holding that a state law requiring interest from IOLTA account be transferred to a different owner for public use could be a *per se* taking requiring the payment of just compensation to the owner); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S. Ct. 446 (1980) (holding that the Takings Clause applies to monetary interest generated from the operation of a specific, separately identifiable fund of money); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (holding that a materialmen's lien provided under state law was a "compensable property interest within the meaning of the Fifth Amendment"). *See also Phillips v. Washington Legal Found.*, 524 U.S. 156, 160, 118 S. Ct. 1925 (1998) (holding that interest on income generated by funds held in IOLTA accounts is private property of the owner for purposes of the Takings Clause).

The court must emphasize what is and what is not involved in plaintiffs' claim. Plaintiffs are not complaining that they were not paid wages for their labor, which might hypothetically state a claim for breach of an employment agreement. They do not allege that they were not paid for overtime work. *See* Federal Employee Pay Act, 5 U.S.C. § 5541 *et seq.* (2002). What they do complain of is that they are owed money for overtime for an amount that need be calculated under the FLSA before it was amended by Congress.

This is either a standard claim for money under the FLSA or a due process claim challenging retroactive application of the amendment. However, it is not a Takings Claim under the Fifth Amendment, for even if an obligation to pay money can be considered property, no property was here seized for public use. In other words, nothing was really "taken" from plaintiffs for the of the public—at best, proceeds simply were not paid. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) (holding that there can be no compensation under the Takings Clause if "the United States has taken nothing for its own use").

Accordingly, the government did not appropriate plaintiffs' money for its own purpose. Instead, it simply did not pay plaintiffs FLSA overtime because it believed plaintiffs' exempt, a conclusion buttressed by the D.C. Circuit. *See Adams v. Hinchman*, 154 F.3d 420 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999). Indeed, for courts to rule otherwise in cases like this one would elevate ordinary claims for monies owed by government into constitutional cases. And this court agrees with defendant that to so rule would also produce absurd semantic results. *See Branch v. United States*, 69 F.3d 1571, 1575-1576 (Fed. Cir. 1995) ("To be sure, analyzing the assessment under the principles of takings law is awkward ... because the property allegedly taken in this case was money [which]

leads to the curious conclusion that the government may take the bank's money as long as it pays the money back"). When cash payments are solely involved, it is strained to talk about cash for cash as compensation when it is really a kind of replevin or debt payment.

Plaintiffs' initial defense—that what is at stake here is not an obligation to pay earned overtime, but rather labor taken by the government—is likewise unconvincing. The primary case plaintiffs cite for the proposition that labor is in-and-of-itself property, *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55 (2nd Cir. 1984), says nothing of the kind. *Donovan* clearly is not a takings case, but a statutory FLSA case for pre- and post-judgment interest on wrongfully withheld overtime compensation by a private employer. All that was at stake in this case was at best a statutory right.

Also unpersuasive is plaintiffs subsequent argument that *Donovan* falls under the Supreme Court's holding in *Brown* because in both these cases the amount of interest owed was ascertainable. Pl.'s Supplemental Br. at 2-3. First, this misconstrues *Brown*, which held that transfer of interest to a *non-owner* of a specific IOLTA account was a taking. Unlike *Brown*, *Donovan* dealt with interest owed on a judgment not yet paid to the claimed *owner*. Second, *Donovan* is a mere liability case. The fact that the amount or type of damages sought in a claim is ascertainable does not transform it into a property right, nor elevate what is an ordinary action for money into a constitutional case.

Be that as it may, how one interprets *Donovan* is here largely academic. Plaintiffs may not at this late date raise novel theories.[19] It is not in their complaint, which instead

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[19] For instance, plaintiffs also argue that the proposition that labor is a property is supported by none other than James Madison himself, the author of the Bill of Rights, of which the Fifth Amendment is, of course, a component. Pl.'s Supplemental Br. at 1. Plaintiffs quote from an article in the Spring/Summer 1990 edition of the *Cato Journal*, which, in turn,

refers to the alleged property interest taken as "duly earned wages." Compl. at ¶¶ 40-45.

Finally, plaintiffs' multitude of other cases cited to support the proposition that statutorily earned overtime

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selectively quotes from James Madison's famous *Essay on Property*. Plaintiffs are perhaps correct in concluding that James Madison's definition of property in his famous essay (first published in the March 27, 1792 edition of *The National Gazette*) might be wide enough to encompass their labor-is-property postulate:

> This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

James Madison, *Essay of Property*, reprinted in Kurland, *The Founders' Constitution*, Vol. 1, Ch. 16, Document 23, University of Chicago Press (1987) (emphasis original, original spelling). One can readily see that Madison recognizes that his definition is broader than that of the common law and Blackstone's, which is quoted in the first sentence in this excerpt. The essay reveals that Mr. Madison's definition of property includes such ideas as freedom of conscience and religion, precepts we today typically associate with the First Amendment. Madison's ideas certainly had an immense impact on the founding generation and on posterity, but his philosophy should not be confused with *"the law."* This court is bound by precedent and other law—not by a particular political creed—no matter how personally persuasive it is to the court. Indeed, James Madison, who along with Alexander Hamilton and John Jay authored *The Federalist Papers* under the pseudonym *Publius*, likely would approve. *See* THE FEDERALIST No. 78 ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature .... The courts must declare the sense of the law ....")(Alexander Hamilton).

payments are property requiring compensation under the Takings Clause are either inapplicable[20] or inapposite. *United States v. Larinoff*, 431 U.S. 864 (1977) is the prime example of the latter. In this case, the Supreme Court struck down the retroactive elimination of a military reenlistment bonus. A serviceman had enlisted in a special military program which trained personnel in communications technology. Because this specialized training was in short supply, the military offered Mr. Larinoff a bonus if he agreed to extend his service beyond the original enlistment period. Larinoff agreed to this "re-enlistment," however, during the time of his service Congress retroactively eliminated the bonus. The Court held that Larinoff was entitled to the bonus at the time he originally enlisted since it was at that time that he agreed to extend his service through the re-enlistment agreement.

Plaintiffs in the case at bar claim *Larionoff* applies because their right to the FLSA overtime "vested"—as plaintiffs term it—at the end of each pay period, and therefore, Congress could not retroactively eliminate plaintiffs' entitlement to that payment. Nevertheless, *Larionoff* is not a constitutional takings case establishing the existence of a property interest. Instead, it is a case of statutory interpretation establishing the right to an entitlement.[21] *Larionoff*, 431 U.S. at 868, 97 S. Ct. at 2154

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[20] Among other of plaintiffs' sundry cases cited for support are: *Cienega Gardens v. United States*, 2003 WL 21356416 (Fed. Cir. 2003); *Gonzales v. United States*, 275 F.3d 1340 (Fed. Cir. 2001); *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992); *National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714 (Fed. Cir. 1998); and *PI Electronics Corporation v. United States*, 55 Fed. Cl. 279 (2003). What each of these cases have in common is that they have little or nothing in common with the precise issue in this case. The court will address only those cited authorities where such citation adds a colorable argument to the controversy *sub judice*.

[21] Generally, entitlements are government conferred benefits safeguarded by procedural due process; for a claim for entitlement to be

("Both the Government and respondents recognize that [a] 'soldier's entitlement to pay is dependent upon statutory right,' and that accordingly the rights of the affected service members must be determined by reference to the statutes and regulations governing the [program], rather than to ordinary contract principles.") (citing *Bell v. United States*, 366 U.S. 393, 401, 6 L. Ed. 2d 365, 81 S. Ct. 1230, 1235 (1961)).

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considered legitimate, it must be based on something more than a unilateral expectation. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Traditionally, whether property was protected as such was determined by whether it was a right or a privilege. *See Barsky v. Board of Regents*, 347 U.S. 442, 451, 74 S. Ct. 650, 655-656 (1954) (noting that the right-privilege distinction is between common law property and state largess such as attendance in state universities). With the growth of government benefits, the distinction between rights and privileges broke down. *See generally* Reich, *The New Property*, 73 Yale L. J. 733 (1964) (certain government benefits which do not fall under traditional notions of property ought to have some protection against arbitrary government action). Towards the last decades of the Twentieth Century, the Supreme Court began to apply procedural due process to various benefits to safeguard against unfairness. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding AFDC welfare payments were considered "entitlements" deserving Fifth Amendment due process protection) (citing Reich, at 1017 n. 8).

The Supreme Court appears now to require protection for only those discreet interests encompassing life, liberty or property contained in the Due Process Clause. *See Lawrence v. Texas*, 123 S. Ct. 2472 156 L. Ed. 2d 508 2003 U.S. LEXIS 5013 (holding that the precept of liberty historically encompasses the protection of intimacy in the bedroom); *Roth*, 408 U.S. at 577 (holding that entitlements can not be a mere expectancy to qualify for due process protection as something akin to a statutorily created property interest). This has been interpreted as a partial return to the old right-privilege distinction. *See* Smolla, *The Re-emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69 (1982); *Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 Cal. L. Rev. 1039, 1044 (1984). *See generally* R. Rotunda and J. Nowak, 3 Treatise on Constitutional law: Substance and Procedure (3rd ed. 1999) at 6-7.

Plaintiffs similarly cite *Zucker v. United States*, 758 F.2d 637 (Fed. Cir. 1985), for the proposition that their expectation of FLSA overtime payments is a property right. But their effort fails because, like *Larionoff*, *Zucker* is in essence a statutory entitlement case and not a Fifth Amendment takings case. In *Zucker*, the Federal Circuit held that a congressional amendment to the Civil Service Retirement Act which decreased the cost-of-living adjustments (COLA) for retirees did not violate procedural due process because retirement benefits were legitimately subject to change and, therefore, could not be considered an entitlement. *Zucker*, 758 F.2d at 639-640. In so holding, the court's analysis revolved around whether the applicable COLA was a statutory entitlement. *Id.* at 639 ("To have a property interest in a benefit protected by procedural due process, a person must have a legitimate claim of entitlement to the benefit.") (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701, 2709 (1972)). It is significant that the court rejected a takings argument in this context because COLA increases were statutory and not contractual in nature.[22] *Id.* at 640.

The confusion for plaintiffs lies in that *Zucker* uses the term "property interest" interchangeably with the more accurate description "entitlement." But what may be a statutorily created entitlement or "property interest" in a Due Process Clause context may or may not neatly fit into Takings Clause analysis, as *Zucker* amply demonstrates.

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[22] A problem raised before, yet not addressed by, the *Zucker* court is where a statutory program creates *both* an "entitlement" and a cognizable property interest protected under the Takings Clause of the Fifth Amendment. This may conceivably occur when the statutory program calls for, or in essence creates, a contractual relationship defined as property by common law or state law. A breach of the contract could give rise to a takings clause violation. *See Ruckelshaus v. Monsanto Co*, 467 U.S. 986 (1984). But, the property interest must be separate and distinct from any rights conferred by contract. *Prudential Insurance Co. v. United States*, 801 F.2d 1295, 1300 n.13 (Fed. Cir. 1986).

This court, however, need not reach this issue, for under the facts of the case *sub judice*, plaintiffs' claim falls under neither.

At its heart, plaintiffs' claim really is a challenge to retroactive legislation that allegedly illicitly diminished plaintiffs' then existing statutory benefits. The crux of plaintiffs' claim is therefore that the amendments to section 640 are unlawful. As a general proposition: "Such a holding, however, cannot properly derive from the Takings Clause, which is not prohibitory, but rather compensatory in nature." *Commonwealth Edison Co.*, 46 Fed. Cl. at 41-42 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315, 107 S. Ct. 2378 (1987) ("[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.") (emphasis in original) (citations omitted). Consequently, plaintiffs' claim does not fall under the safeguard of the Takings Clause, but is at best a due process claim to secure an alleged entitlement—a claim heretofore rejected by the D.C. Circuit in *Adams v. Hinchman*.

C. Did the Retroactive Amendments to Section 640 Amount to an Unconstitutional Taking of a "Cause-of-Action" or "Right"?

Almost as an afterthought, plaintiffs present an alternative theory for recovery under the Takings Clause based on the premise that what was taken from them was a cause-of-action to protect property or another legal right. It is not all together clear what this argument entails. There are two possibilities.

The first is predicated on the fact that in the present action plaintiffs are seeking to vindicate both their "claims to FLSA back wages" and their "statutory rights ... under the FLSA." Pl.'s. Supplemental Br. in Opp'n to Def.'s Mot. to Dismiss at 9-10. Citing *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481-1482 (Fed. Cir. 1994), and *Hodel v. Irving*, 481 U.S. 704 (1987) plaintiffs correctly establish that the Takings Clause requires compensation for a taking of a cause-of-action to sue to protect a legal right, such as real property (*Alliance*), or an appropriation of a right protected by law, such as the common law right of descent and devise (*Hodel*). Plaintiffs go on to equate these two rules of law with their own cause by contending that "in the instant case, plaintiffs have been deprived not merely of their FLSA pay, which the Government has withheld for their own use, but also of [both] their statutory rights thereto under [the] FLSA" (*Id.* at 10), as well as their right to vindicate "plaintiffs' claims to FLSA back wages" (*id.* at 9 (emphasis original)).

But these contentions are fatally flawed. As to the latter two, those are legal conclusions that either were rejected by the D.C. District Court and D.C. Circuit, or belied by the salient fact that plaintiffs were able to prosecute actions to protect their constitutional, statutory and administrative rights in those fora. As to the former, that is a contention rejected by this court in the prior section of this opinion. In reality, plaintiffs are attempting to shoehorn their spurned argument that an obligation to pay overtime is a property right into the rhetoric of *Alliance* and *Hodel*. It simply does not fit.

However, perhaps—it is not clear—plaintiffs are arguing a second scenario: that because the retroactive amendment to section 640 shortened the statute of limitations period in which to vindicate FLSA statutory rights, for at least the discreet period of time lost, a cause-

of-action protecting a federal statutory entitlement was unconstitutionally extinguished. But even this somewhat more sophisticated argument must fail for essentially the same reasons as did the prior one. While it is true that in certain circumstances abolition of a cause-of-action can rise to a level of an unconstitutional taking (*see Cities Servs. Co. v. McGrath*, 342 U.S. 330, 72 S. Ct. 334 (1952); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)), it is equally true that plaintiffs' cause-of-action must secure a cognizable "legally protected interest." *See United States v. Willow River Power Co.*, 324 U.S. 499, 503, 65 S. Ct. 761, 764 (1945). Plaintiffs have two fundamental problems in that regard. The first, as explained above, is that their claim for overtime payment is not cognizable as a property right protected by the Takings Clause. The second, is that the D.C. District Court and the D.C. Circuit on appeal upheld the legality of Congress' retroactive amendment to section 640, and rejected plaintiffs' other constitutional, as well as, statutory and Administrative Procedure Act claims.

Thus, no matter how one looks at it, no claim, in other words, no cause-of-action, to protect plaintiffs' rights has been unconstitutionally taken from them. To be sure, plaintiffs in this case are not really complaining about a taking of a specie of property. What they are in reality seeking to safeguard is a statutory grant of largesse from revocation by Congress. Such a claim more properly falls under the rubric of due process of law, a claim over which this court has no jurisdiction and which plaintiffs previously and unsuccessfully prosecuted in the D.C. District Court and the D.C. Circuit Court of Appeals.

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss is **GRANTED**. The Clerk of the Court is hereby **ORDERED** to enter final judgment in favor of defendant.

NO COSTS.

Lawrence J. Block
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, et al.,

Plaintiffs,

v.

DAVID M. WALKER, Comptroller General of the United States, et al.,

Defendants.

Civil Action No. 95-2015.

Filed: Mar. 30, 2000

ORDER

JUNE L. GREEN, District Judge.

For the reasons stated in the attached memorandum of law, it is by the Court this 30th day of March 2000,

ORDERED that Plaintiffs' Motion for Leave under Rule 15, F.R.C.P. to Amend their Complaint; to Vacate this Court's Prior Decisions Concerning Plaintiffs' Takings Claims; and to Transfer Plaintiffs' Amended Complaint to the United States Court of Federal Claims Pursuant to 29 U.S.C. §1631, is **GRANTED** and the Clerk is directed to file Plaintiffs' First Amended Complaint, and then transfer this case to the Court of Federal Claims. The Court's rulings with regard to the Plaintiffs' takings claims are deemed **VACATED**; it is further

ORDERED that the Defendants' Motion to Dismiss is **DENIED**; and it is further

ORDERED that the Clerk shall send copies of this Order to:

Jules Bernstein, Esq.
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1920 L Street, N.W., Suite-602
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Susan K. Rudy, Esq.
U.S. Department of Justice
Civil Division
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Rm-968
901 E Street, N.W.
Washington, D.C. 20530

/s/ June L. Green.
June L. Green
United States District Court
Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5121

STEPHEN S. ADAMS, et al.,
Appellants,

v.

JAMES F. HINCHMAN, Acting Comptroller General of the United States General Accounting Office, et al.,
Appellees.

Argued: March 12, 1998.
Decided: Aug. 28, 1998.
Rehearing Denied: Nov. 9, 1998.

Before RANDOLPH, ROGERS, and TATEL, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's judgment rejecting the claims of 14,122 current and former federal criminal investigators or other law enforcement officers. The plaintiffs were employed between 1984 and 1995 in federal agencies such as the Customs Service, the Secret Service, the Internal Revenue Service, the Drug Enforcement Agency and the Bureau of Alcohol, Tobacco and Firearms.[23] Between February 16, 1990, and

[23] The original defendants were then Comptroller General of the General Accounting Office, Charles A. Bowsher, and the heads of the various federal agencies. On September 30, 1996, Mr. Bowsher retired.

December 13, 1995, they filed civil actions in the Court of Federal Claims alleging that they had been wrongfully classified as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* During the same period, each employee also filed an administrative claim at the Government Accounting Office. Of the 14,122 employees, 11,247 brought suit before June 30, 1994.

In a consolidated case, the Court of Federal Claims held that certain grades of employees—namely, GS-9 and GS-11 investigators at BATF, DEA, IRS, and Secret Service, and GS-9 investigators at Customs Service—were not exempt from FLSA, and thus had been entitled to overtime pay. *Adams v. United States*, 27 Fed. Cl. 5 (1992). On March 16, 1994, these plaintiffs entered into settlement agreements with the United States. The agreements gave the plaintiffs "back pay and interest ... for the two-year period prior to the date that each such plaintiff filed suit" but did not prejudice their rights to pursue administrative remedies. Counsel then corresponded with the GAO regarding the pending administrative claims.

The authority of the GAO to settle claims against the United States is found in the Barring Act, 31 U.S.C. § 3702.[24] According to the GAO, "to settle a claim means to administratively determine the validity of that claim .... Settlement includes the making of both factual and legal determinations. The authority to settle and adjust claims does not, however, include the authority to compromise claims." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 11-6 (1982); *see also*

The acting Comptroller General, James Hinchman, was substituted as defendant.

24 The GAO's authority to settle federal employees' compensation claims has since been transferred to the Office of Personnel Management. *See* 31 U.S.C.A. § 3702(a)(2) (West Supp.1998)

Illinois Surety Co. v. United States ex rel. Peeler, 240 U.S. 214, 219, 36 S.Ct. 321, 60 L.Ed. 609 (1916). Under 31 U.S.C. § 3702(b)(1)(A), a claim against the government "must be received ... within six years after the claim accrues except ... as provided in this chapter or another law."

Lawsuits for back pay under FLSA are subject to the Portal-to-Portal Act's statute of limitations—two years for non-willful violations and three years for willful ones.[25] *See* 29 U.S.C. § 255(a). Shortly after FLSA coverage was extended to federal employees, however, the GAO ruled that "the time limitation for the filing of claims by federal employees under the FLSA which may be considered by our office is six years ...." *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). The GAO relied in part on a letter from the Civil Service Commission, reasoning that the language of 29 U.S.C. § 255—which spoke exclusively in terms of a "cause of action"—limited it to judicial proceedings and did not apply to administrative claims. *See also* PRINCIPLES 11-22 ("[T]he time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by [then-] 31 U.S.C. § 71a, notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrued could still be considered administratively, although the claimant would have lost his recourse to the courts.").

In back pay and overtime cases, the statute of limitations determines how many years of compensation each claimant receives. Since these are continuing claims, a separate cause of action accrues each payday. A six-year

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[25] One of the purposes of the Portal-to-Portal Act, enacted in response to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), was to substitute a uniform federal limitations period for the diverse periods provided under state law. *See Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C.Cir.1972).

statute of limitations means that an employee could recover six years of back pay or overtime compensation dating from the time he or she first filed suit.

On May 23, 1994, the GAO overruled *Transportation Systems Center*.[26] In *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994), the GAO held that the shorter statute of limitations found in the Portal-to-Portal Act would henceforth be applied "in the settlement of pending and future FLSA claims filed with GAO by federal employees." The GAO concluded that 29 U.S.C. § 255 was "another law"—and thus an exception to the six-year limitation period in 31 U.S.C. § 3701(b)(1)(A).

On July 1, 1994, Senator Sarbanes introduced legislation intended, he said, "to reverse a very destructive ruling by the General Accounting Office to apply a retroactive change in the statute of limitations from 6 years to 2 years for Federal employees to file back pay claims under" FLSA. 140 CONG. REC. S8400 (July 1, 1994). As enacted on September 30, 1994, § 640 of the Treasury, Postal Service and General Government Appropriations Act of 1995, Pub.L. No. 103-329, 108 Stat. 2383, 2432, provided:

> In the administration of Section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal Employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.*) for claims filed before June 30, 1994.

Senator Sarbanes added that while "the underlying question regarding the appropriate length of the statute of limitation for FLSA claims is one of continuing debate ... under no circumstances should GAO apply the proposed change retroactively." 140 CONG. REC. S8400.

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[26] In doing so, the GAO also overruled *In re Henry G. Tomkowiak*, 67 Comp. Gen. 247 (1988), and *In re Federal Firefighters*, 68 Comp. Gen. 681 (1989), which had applied the six-year statute of limitations.

In what was apparently its first decision after passage of § 640, the GAO applied a six-year statute of limitations to claims filed on May 22, 1989, and pending before it as of June 30, 1994. *See In re Molly D. Kinsley*, 1995 WL 9720 (Jan. 9, 1995). The GAO explained that § 640 "obviates the need for us to discuss the effect, if any, of *Joseph M. Ford* .... In light of section 640, the *Ford* holding is applicable only to claims filed on or after June 30, 1994." *Id.* at n. 7.

Meanwhile, counsel for the employees again contacted the GAO and requested a meeting to resolve pending claims in light of § 640. The GAO acknowledged that "the Act of Congress has modified our *Ford* decision" but pointed out that "our regulations require that the agency from which the claim originated shall initially adjudicate the claim. *See* 4 C.F.R. § 31.4 (1994)."[27] Counsel then brought their clients' claims to the attention of the employing agencies, each of which responded that § 640 gave specific authority to apply a six-year statute of limitations *only* to the Comptroller General and that the agencies themselves were without statutory authority to do so. Counsel appealed these denials to the GAO, but the GAO did not respond. However, with regard to an unrelated FLSA case, the GAO informed the Personnel Director of the U.S. Customs Service that it did "not intend to issue a decision in *Marvin B. Atkinson* ... until the Treasury, Postal Service, and General Government Appropriations Bill, 1996 ... is enacted (because of the possible retroactive repeal of § 640)."

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27 4 C.F.R. § 31.4 provides in part:

A claimant should file his or her claim with the administrative agency or department out of whose activities the claim arose. The agency shall initially adjudicate the claim. If the claimant is not satisfied with the agency's determination, he or she may appeal that determination to the Claims Group, General Accounting Office. Claims which cannot be resolved by the department or agency shall be transmitted to the Claims Group, General Accounting Office, for resolution.

> In November 1995, Congress amended § 640 to state:
>
> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

Pub.L. No. 104-52, 109 Stat. 468. Introducing this amendment, Representative Lightfoot said that the GAO, in its 1978 decision, "made a mistake and established regulations stating that Federal employees can get up to 6 years back pay for overtime claims" under the FLSA. The GAO discovered and corrected "its mistake," but then the 103rd Congress "reversed GAO, and passed a law allowing Federal workers to get up to 6 years back pay. The problem is that this act will cost as much as $460 million .... The conferees were faced with a choice—either pay hundreds of millions for work done many years ago ... or give the Federal workers the same rights as their private sector counterparts .... [W]e included language providing for the same treatment for public and private workers ... not just because it costs a lot of money, but because it is fair." 141 CONG. REC. H12376 (Nov. 15, 1995).

After the amendment of § 640, the GAO decided *Atkinson*, a case in which the plaintiffs here had been granted leave to intervene. *In re Marvin B. Atkinson*, 1996 WL 31212 (Jan. 29, 1996). Atkinson's claim had been filed on January 1, 1994, and sought compensation for the time he spent traveling between home and work while driving a government vehicle. Atkinson's employing agency denied his claim after the GAO decided *Ford*; he based his administrative appeal on the original § 640. The GAO held that "the November 19, 1995 amendment to section 640 effectively reestablishes the two-year statute of limitations

for any claim where the employee has received overtime pay under any other law or any claim for time spent commuting. We see no basis for the assertion that this amendment does not apply to Mr. Atkinson's claim." *Id.*

On October 27, 1995—before passage of the amendment to § 640 or the GAO's decision in *Atkinson*—plaintiffs brought this action in district court seeking "mandamus and injunctive and declaratory relief." The complaint challenged *Ford*'s adoption of a shortened, retroactive statute of limitation; the GAO's insistence that plaintiffs bring their claims before their respective agencies; the refusal of those agencies to grant the claims; and the GAO's refusal to pass on their appeals. In Supplemental Complaints dated December 13, 1995, and January 29, 1996, plaintiffs added the amendment to § 640 and the GAO's decision in *Atkinson* to their list of requests for declaratory relief.

Plaintiffs alleged that the GAO's decision in *Ford* and the amendment to § 640 had offended due process. They asserted property interests in their back pay claims before the GAO and in their earned but unpaid compensation.[28] On October 10, 1996, the district court (Judge June L. Green) granted defendants' motion for summary judgment. The court later denied plaintiffs' motion for reconsideration. Our review of a grant of summary judgment is de novo. With one exception, we shall affirm the district court's judgment substantially for the reasons stated in the court's thorough and well-reasoned opinion.[29]

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28 On appeal, plaintiffs also maintain that they have a property interest in the statute of limitations itself. Brief for Appellants at 45. They cite no support for the assertion of such an interest and we are aware of none. As explained earlier, the amount of overtime that plaintiffs can claim is limited by the governing statute of limitations. Thus the two are essentially the same and the same analysis applies.

29 Appellees have moved to strike section III of plaintiff-appellants' reply brief on the ground that it raised issues not advanced in their opening brief. Plaintiffs there contended for the first time that the

The district court held that the GAO's prior application of a six-year statute of limitations had been an error. *Adams v. Bowsher*, 946 F.Supp. 37, 42 (D.D.C.1996). It decided that plaintiffs had no property interest in their pending administrative claims because "a cause of action ... affords no definite or enforceable property right until reduced to a final judgment." *Id.* at 41 (quoting *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1436 (9th Cir. 1988)). *See also Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir.1989); *Hammond v. United States*, 786 F.2d 8 (1st Cir.1986). Without reaching the issue whether enactment of the original § 640 gave certain plaintiffs property rights in their unpaid overtime, we agree with the district court that any such property interest could be extinguished so long as the retroactive economic legislation met the guarantees of due process. *See General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). Analyzing the legislative history of the amendment to § 640, the district court found that the statute had a "legitimate legislative purpose which was furthered by rational means." 946 F.Supp. at 44 (relying on *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). The court emphasized that Representative Lightfoot's statement indicated a desire to promote fairness and to equate "the rights enjoyed by federal employees to those of private sector employees." 946 F.Supp. at 43.

Back Pay Act, 5 U.S.C. § 5596, and the Civil Service Reform Act, 5 U.S.C. § 7121(a), display congressional intent to treat federal and private sector employees differently. *See* Reply Brief for Appellants at 10-13. It is our practice not to consider any issue "raised for the first time in a reply brief," a point at which the opposing side has no opportunity to respond. *See Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 n. 2 (D.C.Cir.1991). We grant the motion to strike.

As for plaintiffs' equal protection claim, the district court determined that plaintiffs and the *Kinsley* claimants, whose claims had been subject to a six-year statute of limitations, were not similarly situated. *Id.* at 45. Unlike the claimants in *Kinsley*, plaintiffs did not have a sufficiently developed factual record for their claims to be processed by the GAO prior to the enactment of the amendment. In addition, plaintiffs charged that the GAO violated the Administrative Procedure Act in deciding *Ford* and in failing to handle their cases in a timely fashion—*i.e.*, before § 640 was amended. Such claims were moot, the district court concluded, because Congress "had impliedly adopted the two or three-year limitation period" and the amendment "passe[d] constitutional muster." 946 F.Supp. at 45. Thus the *Ford* and *Atkinson* decisions were valid and it was beyond the power of the court to compel the GAO to apply a longer statute of limitations.

While we therefore are in general agreement with the district court, we cannot affirm the portion of the court's decision holding that plaintiffs' "property" had not been taken without just compensation, in violation of the Fifth Amendment to the Constitution. *See Adams*, 946 F.Supp. at 44. Applying the test for a compensable taking set forth in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), the district court concluded that any economic impact on individual plaintiffs was slight, that the amended § 640 did not "unduly interfere with a distinct investment-backed expectation," and that "the nature of the action taken by Congress is not inconsistent with the purpose behind the takings clause." 946 F.Supp. at 44.

Repeating the argument they made below, plaintiffs argue that "deprivation of [their] previously earned FLSA wages constitutes an unlawful taking of [their] labor without just compensation under the Fifth Amendment." Brief for

Appellants at 19. We are without jurisdiction to decide this claim. The usual remedy for unconstitutional takings is "a suit for money damage (i.e., the 'just compensation' that the Constitution assures) under the Tucker Act in the Court of Federal Claims, 28 U.S.C. § 1491 ...."[30] *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401 (D.C.Cir.1997). "Except in cases in which the amount in controversy is less than $10,000, in which event jurisdiction is concurrent with the federal district courts, *see* 28 U.S.C. § 1346(a)(2), the Federal Claims Court's jurisdiction in such actions is exclusive." *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 816 (D.C.Cir.1993). While there may be certain exceptions "involv[ing] mandates of direct transfers of money to the government," *see Student Loan Marketing Ass'n*, 104 F.3d at 401 (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.1995)), they are not applicable here. At oral argument, counsel for the plaintiffs represented that each of their individual claims amounted to more than $10,000. If that were true, the district court would not have had jurisdiction to hear the taking claim in the first place. Even if each back pay claim were less than $10,000 and jurisdiction was based on the "Little Tucker Act" (28 U.S.C. § 1346(a)(2)), the United States Court of Appeals for the Federal Circuit—not us—would have exclusive jurisdiction over the appeal. *See* 28 U.S.C. § 1295(a)(2). Either way then, plaintiffs' taking claim is not properly before us.[31] We

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30 In relevant part 28 U.S.C. § 1491(a)(1) provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

31 After oral argument, the parties called our attention to two recently decided cases—*National Treas. Employees Union & Federal Deposit Ins. Corp.*, 53 F.L.R.A. No. 134 (Feb. 27, 1998); and *Eastern Enterprises v. Apfel*, — U.S. —, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998)

therefore remand the takings issue to the district court for a determination of whether jurisdiction was proper under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

For the reasons stated above, the district court's grant of summary judgment is affirmed in part and reversed and remanded in part.

So ordered.

(plurality opinion). Neither decision affects the outcome of this case. *National Treasury Employees Union* appears to support the reasoning of the district court. In *Eastern Enterprises*, four Justices concluded that it was within the district court's power to award equitable relief for a claim arising under the Takings Clause. *See* — U.S. at —, 118 S.Ct. at 2145 (quoting *In re Chateaugay Corp.*, 53 F.3d at 493). Unlike *Eastern Enterprises*, plaintiffs here are not threatened with a taking by a "challenged statute" that "requires a direct transfer of funds" from them to the government. *See id.* Rather, they seek compensation from the government for unpaid overtime. The only effect of a longer statute of limitations would be to grant plaintiffs more money. Thus the circumstances found to support district court jurisdiction in *Eastern Enterprises* do not exist in this case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, ET AL., PLAINTIFF,

V.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

CIVIL ACTION NO. 95-2015
FILED MARCH 7, 1997

MEMORANDUM

JUNE L. GREEN, United States District Court Judge

Before the Court is Plaintiffs' motion for reconsideration and to alter and amend this Court's Order dated October 10, 1996. The motion is made pursuant to Federal Rule of Civil Procedure 59(e). As a basis for this motion, Plaintiffs argue that reconsideration is required because the Court relied on theories not litigated by the parties and that the Court's conclusions, in certain respects, are contrary to the facts and law. For the reasons that follow, Plaintiff's motion is denied.

A motion brought pursuant to Federal Rule of Civil Procedure 59(e) gives the Court discretionary authority to reconsider an earlier ruling when there has been an "intervening change of controlling law, new evidence becomes available, or there is need to correct a clear error or prevent manifest injustice." Firestone v.Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996), citations omitted.

I. LEGITIMATE LEGISLATIVE PURPOSE

Plaintiffs argue that the Court erred on several important points in reaching its decision. First, Plaintiffs

state that the Court erred by assuming that Plaintiffs would have received "double overtime compensation" had it not been for amended Section 640. The Plaintiffs misinterpret the Court's use of the phrase "double overtime compensation." Whether these Plaintiffs sought or were entitled to "double overtime compensation" is irrelevant to the Court. In analyzing the legitimacy of the Treasury, Postal Service, and General Government Appropriations Act of 1996, Pub. L. 104-52, 109 Stat. 468-69 (1995)("amended Section 640"), the Court meant only to show that the provision excluding employees who had received overtime compensation under another provision of law, was reasonable. As the Court concluded, "fairness" was one of the reasons given for enacting amended Section 640. It is rational for Congress to have determined that employees who had not been compensated under another provision of law were entitled to a longer limitations period.

II. EQUALITY OF FEDERAL WORKER LIMITATIONS PERIOD

Plaintiffs argue also that Congress could not have been attempting to place private and government workers in a position of parity with regard to commuting time because non-federal workers generally are afforded fewer rights to overtime under the Fair Labor Standards Act ("FLSA"). Plaintiffs go to some length to show that many differences exist between the rights of federal and private sector employees in the application of the FLSA and argue that parity between the two groups has never been a goal of Congress.

Again, Plaintiffs have misinterpreted the Court's analysis. In concluding that Congress acted rationally concerning the commuting provision of amended Section 640, the Court determined that equating rights of federal employees and private sector employees under the FLSA was, in fact, one of the reasons for enactment. This does not

mean, however, that the rights of federal and private sector employees must be equalized in every aspect under the FLSA in order for the statute to survive scrutiny. Even if differences remain concerning the rights of the two groups, equating the limitation period for federal and private sector employees for commuting claims is consistent with Congress' stated intention of "fairness" and complies with the rational basis test.

III. APPLICABILITY OF THE WINSTAR DECISION

Plaintiffs next argue that the Court erred by applying the permissive rational basis test. In support, Plaintiffs cite the recent case United States v. Winstar Corp., 116 S.Ct. 2432 (1996), for the proposition that the federal government is held to a higher standard where it seeks to avoid obligations it voluntarily assumed. Plaintiffs argue that the Court failed to address this case in its ruling.

Quite simply, the Court did not address the Winstar decision because it is not applicable to the facts here. The Winstar decision is a contract case that deals with the federal government's breach of the terms of an express agreement into which it had voluntarily entered. Id. There the Plaintiffs, viable financial institutions, were induced by the federal government (Federal Home Loan Bank Board ("FHLBB")) to acquire failing thrifts in return for being given certain accounting treatment. Thereafter, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") making accounting standards for thrifts more stringent. The result of FIRREA was that it effectively altered the existing contracts because it changed the accounting standards. Consequently, two of the plaintiff institutions failed and were forced into liquidation. The Supreme Court, in a plurality decision, concluded that the express contracts had been breached and the plaintiffs were entitled to damages. Id. at 1. The

Plaintiffs here, by contrast, did not plead this case as a contract action. Further, there have never been any facts to suggest the existence of an express contract. An implied contract theory, similarly, is not available to Plaintiffs because, as the Defendants properly point out, any entitlement federal employees may have to compensation is not determined by ordinary contract principles, but by applicable statutes and regulations governing compensation. Kizas v. Webster, 707 F.2d 524, 535 (D.C. Cir. 1983) (citing United States v. Larionoff, 431 U.S. 864, 869 (1977).) The Court has already addressed those statutes and regulations and has made the appropriate rulings.

Even if there were an express contract in this case (or an actionable implied contract), Winstar would not apply. The Supreme Court in Winstar made it clear that nothing in the Winstar record "purported to prevent the Government from changing the way it regulated the thrift industry." Winstar at 28. Contrary to the Plaintiffs here, the plaintiffs in Winstar did not seek to invalidate the new statute nor did they seek injunctive relief against application of the new law. Id. at 41.[1] Instead, the Winstar Plaintiffs sought money damages for breach of the Government's express agreements, and it was on that basis that the Supreme Court made its analysis. The Plaintiffs are simply incorrect in stating that in Winstar "the legislation [FIRREA] was declared unconstitutional." (Mtn. for Recon. at 20).

IV. PLAINTIFFS' "TAKING" CLAIM

The Plaintiffs next argue that this Court erred when it denied their "taking" claim on the basis that Plaintiffs would not suffer a great economic impact. In support, Plaintiffs now allege that each employee would be entitled to

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[1] The Plaintiffs here have never asked for money damages. Instead, they seek declaratory and injunctive relief concerning the statutory limitations period for filing administrative claims. Compl. pp. 1234-1236.

approximately $28,000 in back pay and argue that such an amount is not insubstantial.

The Plaintiffs take issue with the relevance the Court attributes to the fact that this case was not brought as a class action. The Plaintiffs are correct in that the amount of loss to the Plaintiffs would be the same even if this case had been brought as a class action. What the Court was attempting to show, however, was that the Plaintiffs had provided no record evidence reflecting their alleged individual losses and therefore the Court could only speculate as to economic impact. Even now, the Plaintiffs ask the Court to divide an estimated amount a congressman stated during a congressional debate by the number of Plaintiffs here, in order to arrive at an average amount for each Plaintiff. The Court declines to do so.

More important, even if it could be shown that there was a great economic impact on the Plaintiffs, it would not change the Court's holding. As discussed in the original Memorandum and Order, the Court made its conclusions regarding the "taking" claim on the basis that the alleged investment-backed expectation was the limitation period rather than back-pay (which was never sought in the Complaint). The Court determined that there was no legitimate "investment-backed expectation" to a six-year limitation period.

V. RETROACTIVE SHORTENING OF THE STATUTE OF LIMITATIONS

Another basis upon which Plaintiffs ask for reconsideration is that the Court allegedly ignored authority that retroactive shortening of a limitations period is improper. The Court did not address those cases because it determined that such an argument was subsumed by the earlier analysis concerning the viability of the claims at issue and whether the statutes in question withstood

scrutiny. The Plaintiffs present nothing now that would cause the Court to re-visit this issue.

VI. THE DOCTRINE OF EQUITABLE TOLLING

Yet another reason the Plaintiffs ask for reconsideration is on the basis that the "doctrine of equitable tolling" prevents the retroactive application of amended Section 640. Contrary to what Plaintiffs argue, this is a new argument that could have been, but was not, raised earlier. Federal Deposit Insurance Corporation v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)(motions to alter or amend cannot be used to raise arguments which could, and should, have been made before the judgment issued, nor can such motions be used to argue a case under a new legal theory (internal citations omitted)). It is, therefore, untimely.

Even if this claim had been raised in a timely fashion, the Court's conclusion would have been no different. The doctrine of equitable tolling is a judicially constructed doctrine that allows a limitation period to be tolled in two situations: 1) where a Plaintiff files a defective pleading within the statutory period, or 2) "where a complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990), citing, Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959)(adversary's misrepresentation caused plaintiff to let filing period lapse). The Plaintiffs argue that equitable tolling should apply here because they relied on agency notices that the statute of limitations for filing FLSA claims was six years. Reliance alone, however, is not enough. Missing from Plaintiffs' argument is any allegation that the agency engaged in misrepresentation as did the Defendant in Glus. Without the element of intentionality of some wrongdoing, the Court concludes that the doctrine of equitable tolling would not be available to Plaintiffs even if this theory had been raised in a timely manner.

Even more important, Plaintiffs cite no authority that the doctrine of equitable tolling can be used to contravene express congressional action. Congress has considered all of the factors and equities at issue and its conclusions are contained in amended Section 640.

VII. "EQUAL PROTECTION"

As a final basis for reconsideration, Plaintiffs ask the Court to revisit the issue of equal protection. The Court has reviewed Plaintiffs' arguments on this issue and concludes that nothing has been presented that the Court has not already considered. No further analysis, therefore, is warranted and the Court will not alter its Judgment in this regard.

VIII. CONCLUSION

For the reasons stated, the Court finds no basis to alter its Judgment in this case. The Plaintiffs have failed to show that there has been an intervening change of controlling law, new evidence has become available, or there is need to correct a clear error or prevent manifest injustice. Accordingly, Plaintiffs' motion is denied. An appropriate order accompanies this Memorandum.

/s/ June L. Green.
June L. Green
United States District Court Judge

DATE:

[March 6, 1997]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, ET AL., PLAINTIFF,

V.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

CIVIL ACTION NO. 95-2015
FILED MARCH 7, 1997

ORDER

Upon review of Plaintiffs' Motion Under F.R.C.P. Rule 59(e) for Reconsideration and to Alter and Amend the Judgment Filed Herein, the Opposition and Reply thereto, the entire record herein and for the reasons stated in the accompanying memorandum of law, it is by the Court this 6th day of March 1997,

ORDERED that Plaintiffs' motion is DENIED; and it is further

ORDERED that the Clerk shall mail copies of this Order to:

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/s/ June L. Green.
June L. Green
United States District Court
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. ADAMS, et al.,

Plaintiffs,

v.

CHARLES A. BOWSHER, Comptroller General of the United States, et al.,

Defendants.

Civil Action No. 95-2015.

Filed: Oct. 10, 1996

MEMORANDUM

JUNE L. GREEN, District Judge.

Before the Court are Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment. For the reasons stated hereafter, Plaintiffs' motion is denied and Defendants' motion for Summary Judgment is granted.

I. *BACKGROUND*

Plaintiffs are current or former employees of the United States, employed by one of several agencies as criminal investigators or in some other law enforcement capacity. Those agencies include the Bureau of Alcohol, Tobacco and Firearms ("BATF"), Drug Enforcement Administration ("DEA"), Internal Revenue Service ("IRS"), Customs Service ("Customs"), and the U.S. Secret Service ("Secret Service").

In February of 1990, Plaintiffs brought actions in the United States Court of Federal Claims ("CFC"), alleging,

inter alia, that they improperly had been considered exempt from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and were entitled to compensation for unpaid overtime wages.[2] (Compl. ¶ 16). Identical claims were filed simultaneously with the General Accounting Office (GAO). (Compl. ¶ 20). In a decision dated October 30, 1992, the CFC concluded that some of the Plaintiffs employed by those agencies were exempt from the FLSA's overtime compensation provisions, while others were not exempt. *Adams v. United States*, 27 Fed.Cl. 5 (1992). Thereafter, in March 1994, the United States reached "partial" settlement agreements with those plaintiffs the CFC had determined to have been non-exempt from the FLSA. *See* Bernstein Decl., Exhibits 8-10.

In the wake of the CFC decision, as well as the ensuing settlements, Plaintiffs in this case, on April 12, 1994, attempted to have their previously filed administrative claims resolved by GAO. Def.Mot.Sum.J., Ex. 4. On May 23, 1994, GAO issued a ruling in a case similar to Plaintiffs', concluding that the two or three-year statute of limitations period contained in the Portal-to-Portal Act, 29 U.S.C. § 255(a), rather than the six-year limitations period contained in the Barring Act, 31 U.S.C. § 3702(b)(1), was applicable to all pending and future FLSA administrative claims, and, therefore, the claim was time barred. *Matter of: Joseph M. Ford*, 1994 WL 201742 (C.G.) (May 23, 1994). This decision reversed the GAO's previous longstanding interpretation that a six-year limitation period applied for filing FLSA claims.[3]

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[2] Those cases have been consolidated in the CFC under the caption *Adams v. United States*, No. 90-162C.

[3] In fact, GAO had been applying the six-year limitations period found in the Barring Act as early as 1978 and at least twice thereafter. *See Transportation Systems Center*, 57 Comp.Gen. 441 (1978); *Federal Firefighters*, 68 Comp.Gen. 681 (1989).

On September 30, 1994, a six-year statute of limitations for FLSA claims filed with GAO was enacted by Congress with the passage of the 1995 Treasury, Postal Service and General Government Appropriations Act, P.L. 103-329, § 640, 108 Stat. 2432 (1994). ("1995 Act.") Section 640 of the 1995 Act ("original Section 640") directed that a six-year statute of limitations be applied for all claims filed prior to June 30, 1994, thereby reversing the GAO's decision in *Ford. Id.* Notwithstanding, Plaintiffs' claims before GAO were not resolved. Instead, Plaintiffs were told that their claims must first be filed with the Plaintiffs' employing agencies. Def.Mot.Sum.J., Ex. 7.

As directed, Plaintiffs filed their claims in the form of letters to the employing agencies outlining their claims.[4] Def.Mot.Sum.J., Exs. 13, 14.

Between February 15 and May 9, 1995, the agencies denied Plaintiffs' claims on the basis that Section 640 of the 1995 Act authorized only the Comptroller to apply a six-year statute of limitations. Def.Mot.Sum.J., Ex. 15. Plaintiffs appealed these decisions to the GAO. Def.Mot.Sum.J., Ex. 16. The GAO, however, did not act on the appeals immediately, but instead sought comments from the employing agencies. Def.Mot.Sum.J., Ex. 17.

On November 19, 1995, Congress amended Section 640 of the 1995 Act, reaffirming the six-year limitation period for FLSA claims filed prior to June 30, 1994, but making the section inapplicable to employees who had previously "received any compensation for overtime hours worked during the period covered by the claim under any other provision of law ..." and for time spent driving between home and duty station. Treasury, Postal Service, and

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[4] Although only those Plaintiffs who had filed before June 30, 1994, were affected by the 1995 Act, the excluded Plaintiffs continued to argue that they should be extended a six-year limitation period, as well. Def.Mot.Sum.J., Ex. 9 at 2.

General Government Appropriations Act of 1996, Pub.L. 104-52, 109 Stat. 468-69 (1995). ("amended Section 640"). GAO has since applied this statute to deny claims for compensation where an employee was paid for administratively uncontrollable overtime ("AUO") and for time spent driving between the claimant's home and office. *Matter of: Marvin B. Atkinson*, 1996 WL 31212 (C.G.) (January 29, 1996).

II. *DISCUSSION*

This case presents complex issues of law because it not only requires interpretation of various competing statutes, but raises constitutional questions, as well.

Plaintiffs argue that Section 640 of the 1995 Act, as well as the subsequent amendment to that section, violate due process because they operate retroactively to divest Plaintiffs of already earned overtime pay. The Government asserts that no property rights are implicated and, even if there were, the government acted properly because its purpose in passing the statute was both reasonable and rational.

The analytical framework for this case begins with whether Plaintiffs had a vested property interest at stake, *see Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 864 (D.C.Cir.1992), and, if so, whether the retroactive effect of such economic legislation had a "legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) (*quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984)). An examination of the relevant statutes serves as a starting point.

A. *Statute of Limitations Under Fair Labor Standards Act (FLSA)*

The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, which allows claims for unpaid overtime compensation to employees, was made applicable to federal workers by amendment in 1974. 29 U.S.C. § 207(a) (1974). The Statute of Limitations for FLSA claims is found in the Portal-to-Portal Act and allows for a two-year limitations period in cases where the violation of the FLSA is nonwillful and three years where the violation is willful. 29 U.S.C. § 255(a) (1947). Notwithstanding the provisions of the Portal-to-Portal Act, the GAO, pursuant to its authority to settle administrative claims under the Barring Act, 31 U.S.C. § 3702, traditionally has applied the six-year statute found in that section, to administrative FLSA claims. *See Transportation Systems Center*, 57 Comp. Gen. 441 (1978); *Federal Firefighters*, 68 Comp. Gen. 681 (1989).

As stated previously, this policy changed with GAO's decision in *Ford* when the GAO determined that the two or three-year statute of limitations contained in the Portal-to-Portal Act (which is expressly applicable to the FLSA) trumped the six-year period found in the Barring Act. *Ford* at 4. In so concluding, the GAO relied on the language of the Barring Act, which establishes a six-year limit on filing claims with GAO "except ... as provided by ... another law." 31 U.S.C. § 3702(b)(1)(A). The GAO determined "another law" to be the Portal-to-Portal Act and denied the claims on that basis. *Ford* at 4.

Congress, however, extended the two or three-year limitation period to six years by passing Section 640 of the 1995 Act. Although this section effectively reversed the *Ford* decision, it did so only for those Plaintiffs who filed their claims prior to June 30, 1994. Moreover, the amendment to Section 640, enacted a year later, placed further limitations on even these individuals by making the

six-year limitation period applicable only to those who had not received overtime compensation under other specified statutes and circumstances or, whose claims involved commuting time. 1996 Act, § 640.

As matters now stand, the Plaintiffs can be divided into two distinct groups for purposes of this analysis: 1) those who filed their claims after the June 30, 1994, date, and, therefore, fall under the 2-3 year limitation period GAO applies to FLSA claims, and 2) those who filed their claims prior to June 30, 1994, but received overtime compensation under other provisions of law or claim overtime for time spent commuting, and are, therefore, excluded from coverage under amended Section 640.

In either instance, the Court, as an initial matter, must decide whether there is a property interest at stake.

B. *Property Interest*

The two alleged property interests advanced here are: 1) "pending and accrued administrative backpay claims" and 2) "earned but unpaid FLSA overtime compensation." Pls'.Mot.Sum.J. at 1, 44. Courts have held that a cause of action, while a "species of property" protected by due process, nonetheless is "inchoate, and affords no definite or enforceable property right until reduced to a final judgment." *Austin v. City of Bisbee, Arizona*, 855 F.2d 1429, 1435 (9th Cir.1988), *citing In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir.1987). In the *Austin* case, the Plaintiff was a police officer who had filed his FLSA claim in court. Before the court ruled, however, Congress passed retroactive legislation that effectively extinguished the plaintiff's claim. The appellate court concluded that the Plaintiff had failed to perfect his rights prior to the change in the law, and, therefore, had no property interest in the cause of action. *Id.* at 1435. Here, of course, there is no final judgment involving the Plaintiffs' claims and so, the Court reaches a similar conclusion.

With regard to Plaintiffs' alleged property interest in their "earned but unpaid FLSA overtime compensation," the Court views this as a much closer question. "Property rights to public benefits are defined by the statutes or customs that create the benefits." *Jones v. Reagan*, 748 F.2d 1331, 1338 (9th Cir.1984) *citing Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The court in *Austin* dealt with this issue contritely by relying on the decision in *Jones* which stated: "When ... the statute authorizing the benefits is amended or repealed, the property right disappears." *Id.* Although the outcome essentially is correct, the Court is not inclined to agree with the reasoning in *Jones*.

Prior to FLSA being made applicable to federal workers, there was no expectation of overtime compensation under FLSA and, therefore, no due process property interest. Once added to the FLSA, however, federal workers could thereafter expect to receive overtime compensation treatment under FLSA. While this arguably created a property interest, such a conclusion, without looking further, misses the point that the FLSA is a creature of statute and can only confer benefits contained within the statute. The expectation to overtime compensation, therefore, is governed by the provisions of the FLSA and any other applicable statutory provisions. The question then becomes, exactly what rights did the FLSA and relevant statutes confer on the Plaintiffs, *e.g.*, what is the applicable statute of limitations period for the Plaintiffs?

It is at this juncture of the analysis that the posture of the two groups of Plaintiffs becomes important. For the Plaintiffs who filed their claims after June 30, 1994, or are otherwise excluded under amended Section 640, the question is whether they should have been given the two or

three-year limitation period under the Portal-to-Portal Act, or the six-year period under the Barring Act.

Plaintiffs claim that the Barring Act refers to administrative claims while the Portal-to-Portal Act refers only to "causes of action" filed in court. The Court finds no support for such a position. The Court agrees with the reasoning in *Hickman v. United States*, 10 Cl.Ct. 550, 552 (1986), in which the CFC concluded that Congress acted deliberately in setting the limitation period at two or three years and that there was nothing in the legislative record indicating congressional intent to impart a more liberal limitations period to federal employees than to employees in the private sector. Accordingly, this Court cannot construct a statutory interpretation contrary to congressional intent. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The Court is aware that for many years the GAO applied a six-year statute of limitations to FLSA claims filed administratively. The simple fact is that GAO was wrong to do so. Until the passage of Section 640 in the 1995 Act, GAO had no authority to permit a 6 year limitation period for FLSA claims. Moreover, GAO's error cannot impart an expectation sufficient to create a property interest. As the Defendants correctly point out, GAO is granted its authority by Congress and is subject to any limitations Congress may impose. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718, 60 L.Ed.2d 208 (1979). ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."). Here, that limitation was a two or three-year limitation period for FLSA claims. The Court concludes, therefore, that Plaintiffs who are not included under the amended Section 640 (because their claims were

filed after June 30, 1994) have no property interest in back pay claims or unpaid overtime compensation.

The remaining Plaintiffs are a different matter. When Congress extended the statute of limitations for FLSA claims to six years by passage of the original Section 640 of the 1995 Act, Plaintiffs suddenly acquired property interests in their unpaid overtime compensation. Although amended Section 640 excludes many of those who otherwise would have fallen within the original Section 640, the Court does not find that these Plaintiffs automatically lose their property interests. The Court disagrees with the reasoning in *Jones* and *Austin* that Congress may extinguish an otherwise vested property interest concerning agency action merely by passing new legislation. This distinction, however, is academic in light of Congress's authority to deny Plaintiffs their property under a different standard.

C. ***Economic Legislation and Due Process***

The Supreme Court has held that retroactive economic legislation is permissible even if it interferes with legitimate expectations as long as it meets due process guarantees. *Pension Benefit Guaranty Corporation v. R.A. Gray and Co.*, 467 U.S. 717, 730, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984). In order for due process to be satisfied, economic legislation, applied retroactively, must have "a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992). In fact, such legislation is given a presumption of constitutionality and the burden rests on the party challenging the statute to show that it was "arbitrary and irrational." *Usery v. Turner Elkhorn*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976).

There is no question that the legislation involved is economic in nature. Amended Section 640 involves the limitations period for money claims made under FLSA. *See Austin v. City of Bisbee*, 855 F.2d at 1435 ("The FLSA is one

of myriad 'legislative Acts adjusting the burdens and benefits of economic life.'" (internal citations omitted)). Further, by its express language, amended Section 640 is retroactive because it applies to individuals who filed their claims prior to June 30, 1994. Moreover, the statute takes away property rights conferred by the original Section 640 by excluding individuals if they have received overtime compensation under different provisions or if their claims involve overtime for commuting.

The question then becomes whether the purpose of the act was legitimate. In determining the legislative purpose, the Court looks both to the legislative history and the language of the statute for guidance.

The legislative record for amended Section 640 is sparse. In fact, there appears to have been little debate on the matter when it came up for a vote on the floor of the House of Representatives on November 15, 1995. What little debate there was took the form of a statement made by Representative Lightfoot in which he indicated that the bill had bipartisan support. 141 Cong.Rec. H12371-02, H12376 (Nov. 15, 1995). Rep. Lightfoot urged passage of the bill on the basis that the government would otherwise be required to pay out an unanticipatedly large sum of money and that government workers should be given the same rights as their private sector counterparts. *Id.* Rep. Lightfoot concluded by stating: "We agreed, not just because it costs a lot of money, but because it is fair." *Id.*

Were the purpose of this statute merely about saving money, the Court would find the legitimacy element to be a more difficult question. As the record shows, however, avoiding a large expenditure is only one of the several stated purposes behind Amended Section 640. More telling is the legislature's stated intention to put federal workers in the same position as private sector workers—a position

consistent with the 1974 legislation which made FLSA applicable to federal workers.

Complicating this analysis, however, is the final language of Amended Section 640, which provides:

> This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station.

109 Stat. 468-69. If the intention was to equate the rights of federal workers with the private sector, then why did Congress leave the six-year limitation period relatively intact for some employees? Such language seemingly creates a contradiction between one of the purposes for the legislation, and the final language of Amended Section 640.

The Court, however, is only slightly concerned about such a discrepancy. Perhaps Congress, wanting to be "fair" to many who had already filed their claims, let stand the six-year limitation period for those whose claims had been filed prior to June 30, 1994. After all, future claims would be given only the two or three-year limitation period in the Portal-to-Portal Act, which is consistent with the rights afforded to the private sector. What Congress changed in the Amended Section 640 was who (of those who filed prior to June 30, 1994) could take advantage of the extended limitation period. While deciding to allow the six-year limitation period to remain temporarily, Congress apparently decided to limit such claims to those workers who had not received overtime compensation for the same period under another provision of law and to exclude any claims involving time spent commuting. There is nothing improper about this. In fact, with regard to the first limitation, it is difficult to imagine any purpose more

legitimate than preventing workers from receiving double overtime compensation.

As for the limitation concerning commuting, this is a closer question, especially because there is nothing specific in the legislative history that might offer guidance. Nonetheless, consistent with the reasoning thus far, the Court finds the purpose of this provision to be legitimate. As already noted, Rep. Lightfoot gave as reasons for passage of the amendment "cost" and "fairness." But Rep. Lightfoot also spoke of equating the rights enjoyed by federal employees to those of private sector employees. Under 29 U.S.C. § 254(a) and (b) (1947), employers are not generally liable for overtime compensation for commuting absent a contract or custom. This provision has been extended to include federal workers, as well. *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C.Cir.1972), *cert. denied* 409 U.S. 1012, 93 S.Ct. 441, 34 L.Ed.2d 306. In any event, private sector employees are limited by the two or three-year statute of limitations for such actions, as would be the Plaintiffs here were it not for the original Section 640. 29 U.S.C. § 255 (1947). To the extent that Congress acted to equate federal workers' rights with those of the private sector concerning overtime claims for commuting, the Court finds amended Section 640 to have a legitimate purpose. Further, the rational means was to enact amended Section 640.

Accordingly, the Court concludes that Congress, by enacting amended Section 640, had a legitimate purpose which was furthered by a rational means.

D. ***Taking without Compensation***

Plaintiffs also argue that their unpaid FLSA overtime was property that was taken without just compensation in violation of the Fifth Amendment of the Constitution. The Court disagrees.

The test for determining whether a compensable taking has occurred is set forth in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986), in which the Supreme Court identified the following three factors: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action.

Concerning the first factor, the Court does not find that Plaintiffs will suffer a great economic impact. It is true that the total payout for Plaintiffs' claims would run into the millions of dollars and some of the claims go back as far as twelve years. This case, however, is not a class action. The "millions of dollars" figure does not, therefore, inure to the group as a whole. Rather, any impact must be measured against the individual claims. Plaintiffs have failed to show how any one of the Plaintiffs would suffer a greater economic impact than merely losing an entitlement that only in recent years had been discovered. Moreover, insofar as amended Section 640 prevents the Plaintiffs from receiving overtime compensation under FLSA when such compensation was paid under another provision of law, there can be little, if any, economic impact to the Plaintiffs.

Similarly, under the second prong, amended Section 640 does not unduly interfere with a distinct investment-backed expectation. Although the hours worked by the Plaintiffs are tantamount to an investment, there was no legitimate expectation to a six-year limitation period. As recounted previously, the proper limitation period for FLSA claims is two or three years as stated by the Portal-to-Portal Act. 29 U.S.C. § 255(a) (1947). While Congress extended the limitation period for some individuals in some instances, it could also limit the application of this extension and did so.

Plaintiffs' only legitimate expectation was to a two or three-year limitation period.

The final factor concerns the character of the action. The Court finds that this factor, for the most part, is subsumed by the above discussion concerning due process and the legitimacy of Congress's purpose in passing amended Section 640. As the Supreme Court stated in *Connolly*: "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. at 227, 106 S.Ct. at 1027, *quoting Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). Congress apparently decided that it was unfair for the public to bear the burden of a mistake made by GAO. The legislative history of amended Section 640 expressly mentions fairness as a reason for the legislation. 141 Cong.Rec. H12371-02, H12376 (Nov. 15, 1995). Accordingly, the Court finds that the nature of the action taken by Congress is not inconsistent with the purpose behind the takings clause.

E. ***Equal Protection***

Plaintiffs also argue that they were denied equal protection of the laws guaranteed by the Fifth Amendment to the Constitution. Essentially, Plaintiffs allege that in the intervening time between the passage of the original Section 640 and the amended Section 640, several claimants had their claims favorably processed ("Kinsley claimants"), while Plaintiffs' claims were not acted upon during that same period.

The equal protection clause is meant to protect persons similarly situated from receiving disparate treatment under applicable laws. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d

313 (1985). Where such disparate treatment does occur, there must be a rational basis. *Heller v. Doe*, 509 U.S. 312, 318, 113 S.Ct. 2637, 2641, 125 L.Ed.2d 257 (1993). Here, the Court does not reach the rational basis question because the Court concludes that Plaintiffs and the Kinsley claimants were not similarly situated.

Although the Kinsley claimants and the Plaintiffs each had claims that were received by GAO during the interim period between passage of the original section 640 and the amended Section 640, they arrived in very different stages of development. The Kinsley claimants had received rulings on their claims by the Office of Personnel Management (OPM) in 1993, which included a fully developed record of factual findings. *Kinsley*, No. B-235609.2, 1995 WL 9720, 2 (Comp. Gen. Jan. 9, 1995). Plaintiffs, however, had not received administrative rulings on their claims when they first approached GAO following enactment of the original Section 640 and there does not appear to have been a factual record upon which GAO could even have reviewed the claims. While the Plaintiffs, as directed, brought their claims to the employing agencies, the claims for the Kinsley claimants were resolved pursuant to the newly enacted original Section 640 in January 1995. *Id.* By the time Plaintiffs received decisions from the individual agencies (March 10 through May 12, 1995), however, the Treasury Department was already lobbying Congress to repeal original Section 640. (Bernstein Decl., Exs. 11, 12).

Whether such activity is a proper reason to delay resolution of pending claims is a difficult question, but one the Court does not have to answer. Rather, the Court is satisfied that Plaintiffs did not have a sufficiently developed factual record for their claims and, given the sheer number of Plaintiffs in this case, would not have had one by the time

amended Section 640 was enacted in November 1995.[5] The Court, therefore, concludes that Plaintiffs were not denied equal protection of the laws because they were not similarly situated with those whom Plaintiffs complain were given preferential treatment.

F. ***Administrative Procedures Act ("APA")***

In light of the Court's conclusions thus far, Plaintiffs' remaining claims are moot. Plaintiffs allege that the GAO and the employing agencies violated the APA by following the *Ford* decision and again when the GAO failed to resolve Plaintiffs' claims in the interim period between passage of original Section 640 and amended Section 640. Plaintiffs request that the Court declare the *Ford* decision invalid and order the GAO to apply a six-year statute of limitations to all of their claims.

Plaintiffs' claims in this regard depend upon the argued invalidity of amended Section 640. The Court has determined that amended Section 640 passes constitutional muster. Moreover, insofar as Congress impliedly adopted the two or three-year limitation period (and which this Court finds otherwise to be applicable) for all claims that do not fall under amended Section 640, the *Ford* and the *Atkinson* decisions are valid. Finally, the Court cannot in this case "compel agency action unlawfully withheld or unreasonably delayed" under the APA, 5 U.S.C. § 706(1), because the delay complained of has been mooted by enactment of amended Section 640.[6]

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[5] Defendants argue that because of the number of claimants and the enormity of the task of determining their substantive eligibility for backpay, any final decision was months, if not years, away. Def.Mot.Sum.J. at 46.

[6] Of course, the Court expects that those Plaintiffs who meet the criteria of amended Section 640 will have their claims resolved in a timely fashion.

III. *CONCLUSION*

For the reasons stated above, the Court concludes that Congress did not act unconstitutionally by enacting amended Section 640, nor did the GAO violate equal protection guarantees in processing other claims. Finally, in light of these conclusions, Plaintiffs' remaining claims pursuant to the APA are moot. Judgment, therefore, is entered for the Defendants.

U.S. CONST. AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1995 TREASURY, POSTAL SERVICE AND GENERAL GOVERNMENT APPROPRIATIONS ACT
Pub. L. No. 103-329, 108 Stat. 2382, § 640 (1994)

In the administration of section 3702 of title 31, United States Code, the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (U.S.C. 201 et seq.) for claims filed before June 30, 1994.

Pub. L. No. 104-52, 109 Stat. 468 (1995)
TITLE I--DEPARTMENT OF THE TREASURY
DEPARTMENTAL OFFICES
SALARIES AND EXPENSES

For necessary expenses of the Departmental Offices including operation and maintenance of the Treasury Building and Annex; hire of passenger motor vehicles; maintenance, repairs, and improvements of, and purchase of commercial insurance policies for, real properties leased or owned overseas, when necessary for the performance of

official business; not to exceed $2,900,000 for official travel expenses; not to exceed $2,950,000 to remain available until expended, shall be available for information technology modernization requirements; not to exceed $150,000 for official reception and representation expenses; not to exceed $258,000 for unforeseen emergencies of a confidential nature, to be allocated and expended under the direction of the Secretary of the Treasury and to be accounted for solely on his certificate; $105,929,000, of which up to $500,000 shall be available to reimburse the District of Columbia Metropolitan Police Department for personnel costs incurred by the Metropolitan Police Department between May 19, 1995 and September 30, 1995 as a result of the closing to vehicular traffic of Pennsylvania Avenue Northwest and other streets in the vicinity of the White House: Provided, That Section 640 of Title VI of the Treasury Postal Service and General Government Appropriations Act, 1995 (Public Law 103-329, 108 Stat. 2432), is amended by adding at the end thereof the following new sentence: "This section shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station."

Supreme Court, U.S
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Nos. 04-1225 and 04-1226

In the Supreme Court of the United States

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

An action to enforce a cause of action under the Fair Labor Standards Act of 1938 (FLSA) generally must be commenced no later than two years after the cause of action accrued. In addition to their judicial remedies, federal employees with FLSA claims may invoke an administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (2000 & Supp. II 2002). In 1994, Congress retroactively extended the limitations period under the Barring Act from two or three years to six years for FLSA claims of federal employees that had been filed before June 30, 1994. Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 640, 108 Stat. 2432. One year later, Congress amended Section 640 to provide that the retroactive extension "shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law." Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, Tit. I, 109 Stat. 468-469.

The questions presented are as follows:

1. Whether the 1995 legislation violates the Takings Clause.

2. Whether the 1995 legislation violates the Due Process Clause.

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In the Supreme Court of the United States

No. 04-1225

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 04-1226

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

DAVID M. WALKER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in Nos. 04-1225 and 04-1226 (04-1225 Pet. App. 54a-64a; 04-1226 Pet. App. 1a-11a) is reported at 154 F.3d 420. The memorandum and order of the district court in Nos. 04-1225 and 04-1226 (04-1225

Pet. App. 74a-90a; 04-1226 Pet. App. 12a-30a) is reported at 946 F. Supp. 37.

The opinion of the United States Court of Appeals for the Federal Circuit in No. 04-1225 (04-1225 Pet. App. 1a-24a) is reported at 391 F.3d 1212. The opinion of the Court of Federal Claims in No. 04-1225 (04-1225 Pet. App. 25a-51a) is not yet reported, but is available on Westlaw at 2003 WL 22339164.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 28, 1998. Petitions for rehearing were denied on November 9, 1998. The petition for a writ of certiorari was denied on June 7, 1999.

This case was then transferred to the Court of Federal Claims, from which an appeal was taken to the United States Court of Appeals for the Federal Circuit. The Federal Circuit entered its judgment on December 9, 2004. The petitions for a writ of certiorari were filed on March 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to certain occupational and other exemptions, the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, entitles employees to overtime pay (usually based on hours worked in excess of a 40-hour work week) at the rate of one and one-half times an employee's normal hourly compensation. 29 U.S.C. 207(a), 213(a)(1). Employees may bring suit for unpaid FLSA overtime compensation in "any court of competent jurisdiction." 29 U.S.C. 216(b). In the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, Congress added the following statute of limitations to the FLSA:

> Any action commenced * * * to enforce any cause of action for * * * unpaid overtime compensation * * * under the Fair Labor Standards Act * * *
>
> (a) * * * may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. 255(a).

When the FLSA and the Portal-to-Portal Act were enacted, federal employees were expressly excluded from the FLSA's coverage. *Carter* v. *Panama Canal Co.*, 463 F.2d 1289, 1294 & n.10 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972). In 1974, the FLSA was amended to cover federal employees, subject to the statute's general exemptions (*e.g.*, 29 U.S.C. 213) for executive, administrative, and professional employees, among others. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 59 (29 U.S.C. 203(e)(2)(A)).

In addition to their judicial remedies, federal employees may invoke the general administrative claims settlement process provided under the Barring Act, 31 U.S.C. 3702 (2000 & Supp. II 2002). The Barring Act applies to a wide range of monetary claims against the United States. When the claims at issue here were filed, it authorized the Comptroller General to settle claims "received * * * within 6 years after the claim accrues except * * * as provided in this chapter or another law." 31 U.S.C. 3702(b)(1)(A). Non-federal employees may not invoke the Barring Act's administrative process for their FLSA claims because they do not have claims against the government.

2. a. Petitioners are current and former federal law enforcement officers who seek overtime compensation under the FLSA for periods between 1984 and 1995. In suits filed between February 1990 and December 1995 in the Court of Federal Claims (CFC), petitioners claimed that their employing agencies had incorrectly classified their positions as exempt from the overtime provisions of the FLSA. Each petitioner also lodged an administrative claim with the General Accounting Office (GAO) under the Barring Act.

In October 1992, the CFC held that certain grades of employees were not exempt from the FLSA and had therefore been entitled to overtime pay. *Adams* v. *United States*, 27 Fed. Cl. 5 (1992). In March 1994, petitioners entered into settlement agreements with the United States that gave those employees overtime pay and interest for the two-year period before each suit was filed, without prejudice to their right to pursue administrative remedies. 04-1225 Pet. App. 54a-55a. Returning to GAO, petitioners sought a total of six years of back pay under the FLSA —four years beyond what they had obtained in the CFC settlement, and four years beyond what the FLSA itself provides, see 29 U.S.C. 255(a).

b. When GAO had first confronted the question in 1978, it concluded that the six-year period set forth in the Barring Act, 31 U.S.C. 3702(b)(1)(A), applies to administrative proceedings to recover overtime pay under the FLSA. *In re Transportation Sys. Ctr.*, 57 Comp. Gen. 441 (1978). By the time petitioners' administrative claims were pending, however, GAO had begun actively reconsidering that ruling. In *In re Ford*, 73 Comp. Gen. 157 (1994), GAO overruled *Transportation Systems* and determined that the relevant limitations period is the one set forth in the FLSA itself, as amended by the Portal-to-Portal Act.